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ABSTRACT

The primary focus of this legal education module, fifth of five to be integrated into an 11th grade American history course, is that the law is not an all powerful instrument of social control. Understandings, or objectives, consider the following: that the very nature of some social aims, such as brotherhood, places them beyond the limited capacity of law; how the capacity of law may be limited by lack of agreement that law should be used to further a particular social aim; that law is limited in furthering some legal aims because some of the aims of society conflict; how lack of knowledge about the cause or cure of a particular social problem may limit the capacity of law to alleviate the problem; how limits of technological capability may impose limits on the capacity of law; and ways in which the difficulty of accurately determining the facts serves to limit the capacity of law in the appropriate application of legal rules. The format of this module follows that described for the Module I, SO 007 673. (Author/KSM)

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TEACHING ABOUT BASIC LEGAL CONCEPTS IN THE SENIOR HIGH SCHOOL

MODULE V-THE SYSTEM: THE LIMITS OF LAW

The University of the State of New York/The State Education Department
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SO 007 669

MODULE V—THE THE SYSTEM: THE LIMITS OF LAW

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1. *The Main Focus.*

The primary focus of this module is that law is not an all powerful instrument of social control. Even if laws are carefully written and properly enforced, there are limits to what law can be expected to do.

You may have heard somebody complain about some social problem or injustice and heard someone else reply, "Yes, there oughta be a law." This little expression suggests that the right law, properly enforced, can solve any problem. The nature of law, human beings, and society, places some things beyond the reach of law. No law can make a narrow-minded person accept as equals people with different colored skin, and alcoholic prohibition alone cannot overcome problems of alcohol abuse in a society where drinking is socially and morally acceptable. This module focuses on some of the reasons that law may be unsuccessful or ineffective in accomplishing what is expected of it.

2. *Why This Focus?*

There are several reasons why it is important to study limits of law in a module prepared for a social studies class. First, in studying law,we may want to learn important characteristics of law. One such characteristic is that law is not all-powerful. Second, although laws certainly can be improved and used more effectively on some problems, some of the prevalent criticism of and disrespect for law may be undeserved. However, unless one sees that there are limits to what can realistically be expected of law, loss of respect for the rule of law might result because of disenchantment with laws and the legal system. Finally, law in a democracy frequently reflects the demands of concerned citizens. By learning about the limits of law, students who want to improve our society through orderly legal change will be better able to influence such change.

3. *Outline of the Teaching Scheme.*

This module focuses on the concept that the capacity of law is not all-powerful. The six understandings present a survey of some specific factors that limit the capacity of law. In teaching the module, the teacher may wish to reorder, emphasize, or select from these understandings as he sees fit.

The first understanding considers the fact that the very nature of some social aims, such as brotherhood, places them beyond the limited capacity of law. The second understanding considers how the capacity of law may be limited by lack of agreement that law should be used to further a particular social aim. Here, factors such as popular morality or custom may limit the capacity of law. The third understanding examines the fact that law is limited in furthering some legal aims because some of the aims of society conflict. The fourth understanding examines how lack of knowledge about the cause or cure of a particular social problem may limit the capacity of law to alleviate the problem. The fifth understanding considers how limits of technological capability may impose limits on the capacity of law. The sixth understanding considers the ways in which the difficulty of accurately determining the facts serves to limit the capacity of law in the appropriate application of legal rules.

SUMMARY OF UNDERSTANDINGS

I. LAW IS LIMITED IN ITS CAPACITY TO CONTROL SUCH INTANGIBLES AS HUMAN THOUGHTS, BELIEFS, AND VALUES.

II. LAW IS LIMITED IN ITS CAPACITY TO DEAL WITH A SOCIAL PROBLEM WHENEVER THE MEMBERS OF THE SOCIETY DO NOT SUFFICIENTLY SUPPORT THE USE OF LAW IN THIS WAY.

III. LAW IS LIMITED IN ITS CAPACITY TO REALIZE TWO OR MORE VALID SOCIAL OBJECTIVES WHEN THEY CONFLICT WITH EACH OTHER.

IV. LAW IS LIMITED IN ITS CAPACITY TO DEAL WITH A SOCIAL PROBLEM WHEN EITHER THE CAUSES OR REMEDIES OF THE PROBLEM ARE UNKNOWN OR HIGHLY UNCERTAIN.

V. LAW IS LIMITED IN ITS CAPACITY TO DEAL WITH A SOCIAL PROBLEM WHEN NECESSARY RESOURCES AND TECHNOLOGY ARE NOT AVAILABLE.

VI. LAW IS LIMITED IN ITS CAPACITY TO DEAL WITH A SOCIAL PROBLEM WHEN THE PARTICULAR FACTS TO WHICH LAW APPLIES CANNOT BE RELIABLY DETERMINED THROUGH LEGAL PROCESSES.

UNDERSTANDING I

LAW IS LIMITED IN ITS CAPACITY TO CONTROL SUCH INTANGIBLES AS HUMAN THOUGHTS, BELIEFS, AND VALUES.

A. *Explanation of Understanding I*

The first understanding examines the limits of law's capacity to impose a particular set of values upon society. Life might be facilitated if everyone interpreted honesty in the same way, if everyone believed in equal opportunity, if everyone respected human dignity. These are clearly expressions of values in American society, but the capacity of the law to define or implement them is very limited. Law can do little in directly controlling and promoting intangibles such as values, beliefs, or feelings.

In speaking of the limited capacity of law to regulate thoughts and beliefs, in what sense do we mean law is limited? The first response might be that laws demanding or prohibiting certain thoughts or

beliefs are impossible to enforce. At the present time, there is no way to determine what goes on in a person's mind. But one might imagine technological and scientific development of the future that could open the privacy of the mind. In fact, in George Orwell's novel of a super-government, 1984, the primary way the officials control the citizenry is by enforcing the law against 'thought-crime.'

Law is limited when it tries to regulate thoughts, beliefs, or opinion in another sense. In a legal system where individual dignity is a fundamental value, the realm of individual thought, feeling, and belief may not be an appropriate realm for the intrusion of law. Even if such law might increase the number of believers, it could do so at the cost of basic freedoms. A climate in which free expression leads to new ideas, discoveries, and change could be discouraged. When a government uses punishments to discourage what it determines are evil thoughts or beliefs or to encourage what it regards as good thoughts or beliefs, the result may be more socially damaging than if law did not operate in this area.

B. *Teaching Understanding I*

OBJECTIVES

- The student can identify instances in which regulation of thought or belief was proposed and list reasons why such action was ineffectual.
- The student can state several reasons why the regulation of belief is more difficult than the teaching of a belief, and can provide illustrations of attempts to do each in various cultures and periods of history.

QUESTIONS TO REACH UNDERSTANDING

- Why is the regulation of thought difficult?
- How may the basic values of our society be violated by the use of law to regulate thought?
- What uses of law to affect thought could be considered acceptable in our society?

Module 5

DETAILED DESCRIPTION OF STRATEGIES

(a) Excerpts from John Stuart Mill's *Essays on Liberty* on page 8. The questions below may help shape discussion based on these or other passages from this classic statement.

- How effective can governments be in regulating people's beliefs, thoughts, or opinions by direct use of law to prohibit and punish?
- Even if laws could be used effectively to regulate beliefs, how might law be limited in the sense that such regulation may do more social harm than good?

(b) In class discussion, students may explore the establishion of a state religion at the exclusion of other faiths. (See page 10 for "An Act for the Uniformity of Common Prayer and Administration of the Sacraments" and source for "The Bible Commonwealth.") Discussion might center on these questions:

- What was the climate of opinion of the society that supported such regulation?
- What accounts for the emphasis on regulating overt action?

(c) Have students read and discuss a case where regulation of religious practices rather than doctrine is at state. Examples include the following cases:

- State v. Perricone
- Reynolds v. United States

(See page 12-14.)

DISCUSSION OF STRATEGIES AND RESOURCES

Activities to develop Understanding I will relate to one or more of the following points:

1) Regulating belief is more difficult than regulating overt action.
2) Regulation of belief is probably better accomplished by nonlegal means.
3) Regulation of belief and some overt actions signifying belief may not be done in our society because of the social cost of such regulation.

Many believe that some of the problems of our society would be reduced if more people in America heeded basic principles of Judeo-Christian doctrine. Students should consider whether punishing people who fail to believe in Judeo-Christian beliefs would be objectionable.

Using historical examples of establishment of religion to show attempts to regulate beliefs with law may not seem relevant enough for students of the 1970's. Most students know that the first amendment to the U.S. Constitution prohibits Congress from making any "law respecting an establishment of religion, or prohibiting the free exercise thereof... ." But before dismissing the requirement of religious beliefs as history, one might consider that several of the most controversial cases the Supreme Court has handed down in recent years have involved removing religious exercises from the public schools. Allowing Bible reading or nonsectarian prayers in the school may not seem the same as punishing people for failure to believe in "the one true God." This may help explain why the Supreme Court school-religion cases have been largely ignored in many places where people have considered them a misguided legal attempt to discourage belief in God.

DETAILED DESCRIPTION OF STRATEGIES

Discussion should include a comparison of the difficulty of regulating belief with the difficulty of regulating action.

In conjunction with this strategy, the teacher may have students read and discuss "The Case of Sharon Gerber" in *Religious Freedom*.

(d) Have students determine the nature of an established religion and something of the underlying philosophy which justified established churches, and speculate as to the frame of mind or psychology of those who favored such religions.

Then have students read and discuss the "Virginia Statute of Religious Liberty" written by Thomas Jefferson. (See page 15 for sources.) Possible study-guide or discussion-guide questions include these:

- What might have been Jefferson's views of religion which led to his writing this document? (The answer can be checked against Jefferson's own comments on religion found in a collection of his writings.)
- What were some of the characteristics of an established religion which the statute sought to counter?
- What reasons are given for opposing established religions and supporting complete religious freedom?
- Why did some dissenting churches (as well as the established churches) oppose this statute?

DISCUSSION OF STRATEGIES AND RESOURCES

Cases where overt religious practices are at issue are easier to regulate through legal punishment. Analysis of a case where a socially unacceptable religious practice has been prohibited by law may help illustrate that as one moves from the realm of intangible beliefs to the realm of tangible activity, the capacity of law is less limited.

Encouraging patriotism and respect for country is a legitimate concern of governments. The matter of how to promote support for a government is not simple. Legislating conformity to patriotic principles frequently encounters a limit to the capacity of law. It is extremely difficult to enforce such thought conformity. The social cost of such regulation may even endanger the basic principles of a liberal state itself. For example, few would argue that a law requiring citizens to believe in the flag would be either enforceable or proper. A law punishing students' refusal to salute the flag is easily enforced, but raises difficult questions as to propriety. On the other hand, laws prohibiting acts of destruction of the flag have presented easier questions. Consequently, most governments have found more effective the use of law to require that loyalty to basic principles of a government be included in the school curriculum and that other positive steps be taken to insure support. Necessary regulation then centers on action rather than thought.

As the American war for independence was getting underway, the Anglican Church was still the established church in some of the former colonies. Statutes required church attendance until 1777 and it was not until 1779 that the church was disestablished. Some,

DETAILED DESCRIPTION OF STRATEGIES

(e) Recent Supreme Court decisions that have removed religious exercises from the public schools can now be considered in comparison contrast. Possibilities include these cases:

- Engel v. Vitale
- School District v. Schempp
- Why these decisions might be viewed as important to religious freedom by some persons and as an attempt to regulate belief by others?

The consideration of these decisions might take the form of a debate: "Resolved: The decisions in Engel v. Vitale and School District v. Schempp constitute an attempt to regulate belief."

Students may also read and discuss "The Case of William Murray" in *Religious Freedom.*

(f) Have students read and discuss edited versions of cases where students were removed from school for refusal to participate in patriotic ceremonies. These cases include the following:

- West Virginia Board of Education v. Barnette
- Frain v. Baron
- Sheldon v. Fannin

(See page 15 for sources.)

- What was the rationale for removing the students?
- Why were they ultimately not compelled to perform an overt action signifying belief?

DISCUSSION OF STRATEGIES AND RESOURCES

like George Washington, espoused a conservative view in such matters and proposed making all Christian churches state religions. Others including Thomas Jefferson exerted themselves toward the other extreme.

Have students read and discuss "Religious Liberty in Virginia" or similar statements concerning the established church in the colonies. See page 15 for sources, which describes aspects of an established religion in Virginia in 1776. Any other writings from that era which describe a state religion in the colonies will be useful also. For example, relevant comments by Jefferson may be found in many collections of his writings.

The difficulty of regulating belief as compared to the difficulty of teaching belief should become more apparent in these strategies.

Although there is presently no way to tell what goes on within the human mind, there is speculation about technological and scientific developments of the future that could open the privacy of the mind.

DETAILED DESCRIPTION OF STRATEGIES

DISCUSSION OF STRATEGIES AND RESOURCES

(g) Have students examine the New York statute that prohibits abuse of the American flag. Then have students read an edited version of the decision in a case that challenged the New York flag abuse law. The following cases may be used by all students, or by separate groups.

- Street v. New York
- People v. Radich

The two decisions can be compared in class discussion, centering on this question: Why was the prohibition of contemptuous words against the flag declared unconstitutional while the prohibition of contemptuous acts was not.

Conclude this activity with a comparison of section 801 of the New York Education Law to the preceeding statute.

(h) Interested students may read George Orwell's *1984* in which the officials control the citizenry by enforcing laws against "thought-crime." Students might consider the impact of such technological developments as those envisioned by Orwell on the legal system. Some of the ideas and writings of B.F. Skinner (and articles about Skinner and his thinking) might be considered by more capable students in this context.

RESOURCES*

Mill, E.W. *Liberty and law: readings in American government*. Morristown, N.J. Silver Burdett Company. 1971.

A secondary text which contains excerpts from John Stuart Mill on freedom of speech in Unit 4: "Civil Liberties: the Individual and the State," pp. 113-121.

Mill, J.S. *On liberty*, 4th ed. Boston. Ticnor and Fields. 1866.

"The likings and dislikings of society, or some powerful portion of it, are thus the main thing which has practically determined the rules laid down for general observance, under the penalties of law or opinion. And in general, those who have been in advance of society in thought and feeling, have left this condition of things unassailed in principle, however they may have come into conflict with it in some of its details. They have occupied themselves rather in inquiring what things society ought to like or dislike, than in questioning whether its likings or dislikings should be a law to individuals. They preferred endeavoring to alter the feelings of mankind on the particular points on which they were themselves heretical, rather than make common cause in defence of freedom, with heretics generally. ... Those who first broke the yoke of what called itself the Universal Church, were in general as little willing to permit difference of religious opinion as that church itself. But when the heat of the conflict was over, without giving a complete victory to any party, and each church or sect was reduced to limit its hopes to retaining possession of the ground it already occupied; minorities, seeing that they had no chance of becoming majorities, were under the necessity of pleading to those whom they could not convert, for permission to differ. ...

*Direct quotations from statutes are indicated by the use of quotation marks. Other statements are summaries or paraphrases of the statute listed.

"...nothing in the creed of practice of Christians does more to envenom the hatred of Mahomedans against them, than the fact of their eating pork. There are few acts which Christians and Europeans regard with more unaffected disgust, than Mussulmans regard this particular mode of satisfying hunger. It is, in the first place, an offence against their religion; but this circumstance by no means explains either the degree or the kind of their repugnance; for wine also is forbidden by their religion, and to partake of it is by all Mussulmans accounted wrong, but not disgusting. ... Suppose now that in a people of whom the majority were Mussulmans, that majority should insist upon not permitting pork to be eaten within the limits of the country. This would be nothing new in Mahomedan countries. Would it be a legitimate exercise of the moral authority of public opinion? and if not, why not? The practice is really revolting to such a public. They also sincerely think that it is forbidden and abhorred by the Deity. Neither could the prohibition be censured as religious persecution. It might be religious in its origin, but it would not be persecution for religion, since nobody's religion makes it a duty to eat pork. The only tenable ground of condemnation would be, that with the personal tastes and self-regarding concerns of individuals the public has no business to interfere. ...

"Whenever the Puritans have been sufficiently powerful, as in New England, and in Great Britain at the time of the Commonwealth, they have endeavored, with considerable success, to put down all public, and nearly all private, amusements: especially music, dancing, games, or other assemblages for purposes of diversion, and the theatre. There are still in this country large bodies of persons by whose notions of morality and religion these recreations are condemned; and those persons belonging chiefly to the middle class, who are the ascendant power in the present social and political condition of the kingdom, it is by no means impossible that persons of these sentiments may at some time or other command a majority in Parliament. How will the remaining portion of the community like to have the amusements that shall be permitted to them regulated by the religious and moral sentiments of the stricter Calvinists and Methodists? ...

"Another important example of illegitimate interference with the rightful liberty of the individual, not simply threatened, but long since carried into triumphant effect, is Sabbatarian legislation. Without doubt, abstinence on one day in the week, so far as the exigencies of life permit, from the usual daily occupation, though in no respect religiously binding on any except Jews, is a highly beneficial custom. ... But this justification, grounded on the direct interest which others have in each individual's observance of the practice, does not apply to the self-chosen occupations in which a person may think fit to employ his leisure; nor does it hold good, in the smallest degree, for legal restrictions on amusements. It is true that the amusement of some is the day's work of others; but the pleasure, not to say the useful recreation, of many, is worth the labor of a few, provided the occupation is freely chosen, and can be freely resigned. ...The only ground, therefore, on which restrictions on Sunday amusements can be defended, must be that they are religiously wrong; a motive of legislation which never can be too earnestly protested against. .... It remains to be proved that society or any of its officers holds a commission from on high to avenge any supposed offence to Omnipotence, which is not also a wrong to our fellow-creatures. The notion that it is one man's duty that another should be religious, was the foundation of all the religious persecutions ever perpetrated, and if admitted would fully justify them. Though the feeling which breaks out in the repeated attempts to stop railway travelling on Sunday, in the resistence to the opening of Museums, and the like, has not the cruelty of the old persecutors, the state of mind indicated by it is fundamentally the same. It is a determination not to tolerate others in doing what is permitted by their religion, because it is not permitted by the persecutor's religion. It is a belief that God not only abominates the act of the misbeliever, but will not hold us guiltless if we leave him unmolested. ..."

"The Bible commonwealth." *Religious freedom.* Columbus. American Education Publications. AEP Unit Books. 1967. pp. 21-28, 46.

Case study of the problems of a government, the Massachusetts Bay Colony, built on "a convenant with God."

"An act for the uniformity of common prayer and administration of the sacraments," (England, 1552), reproduced in Howard C.G. & Summers, R.S., *Law, its nature, functions and limits.* Englewood Cliffs, N.J. Prentice-Hall, Inc. 1965. pp. 427-429.

"AN ACT FOR THE UNIFORMITY OF COMMON PRAYER AND ADMINISTRATION OF THE SACRAMENTS

"Where there hath been a very godly Order set forth by the Authority of Parliament, for Common Prayer and Administration of the Sacraments to be used in the Mother Tongue within the Church of England, agreeable to the World of God and the Primitive Church, very comfortable to all good

People desiring to live in Christian Conversation, and most profitable to the Estate of this Realm, upon which the Mercy, Favour and Blessing of Almighty God is in no wise so readily and plenteously poured as by Common Prayers, due using of the Sacraments, and often preaching of the Gospel, with the Devotion of the Hearers: And yet this notwithstanding, a great Number of People in divers Parts of this Realm, following their own Sensuality, and living either without Knowledge or due Fear of God, do wilfully and damnably before Almighty God abstain and refuse to come to their Parish Churches and other Places of Common Prayer, Administration of the Sacraments, and Preaching of the Word of God, is used upon Sundays and other Days ordained to be Holydays.

"II. For Reformation hereof, Be it enacted by the King our Sovereign Lord, with the Assent of the Lords and Commons in this present Parliament assembled, and by the Authority of the same, That from and after the Feast of All Saints next coming, all and every Person and Persons inhabiting within this Realm, or any other the King's Majesty's Dominions, shall diligently and faithfully (having no lawful or reasonable Excuse to be absent) endeavor themselves to resort to their Parish Church or Chapel accustomed; or upon reasonable Let thereof, to some usual Place where common Prayer and such Service of God shall be used in such Time of Lett, upon every Sunday, and other Days ordained and used to be kept as Holydays; and then and there to abide orderly and soberly during the Time of the Common Prayer, Preachings or other Service of God there to be used and ministred; upon Pain of Punishment by the Censures of the Church. . . .

"VI. And by the Authority foresaid it is now further enacted, That if any Manner of Person or Persons inhabiting and being within this Realm, or any other King's Majesty's Dominions, shall after the said Feast of All Saints willingly and wittingly hear and be present at any other Manner or Form of Common Prayer, of Administration of the Sacraments, of making of Ministers in the Churches, or of any other Rites contained in the Book annexed to this Act, than is mentioned and set forth in the said Book, or that is contrary to the Form of sundry Provisions and Exceptions contained in the foresaid former Statute, and shall be thereof convicted according to the Laws of this Realm, before the Justices of Assise, Justices of Oyer and Determiner, Justices of Peace in their Sessions, or any of them, by the Verdict of twelve Men, or by his or their own Confession or otherwise, shall for the first Offence suffer Imprisonment for six Months, without Bail or Mainprise; and for the second Offence, being likewise convicted as is abovesaid, Imprisonment for one whole Year; and for the third Offence in like Manner, Imprisonment during his or their Lives... ."

State v. Perricone, Vol. 181 Atlantic Reporter, p. 751 (1962).

"The opinion of the court was delivered by

"SCHETTINO, J.

"The Perricones, who are Jehovah's Witnesses, appeal from an order (a) finding them guilty of neglect of their infant son, John, in refusing to grant permission for necessary blood transfusions; (b) appointing Thomas J. Finn, Superintendent of the Berthold S. Pollak Hospital for Chest Diseases, Jersey City, as guardian of the infant and authorizing Mr. Finn to execute the necessary consent for a blood transfusion; and (c) awarding custody and care of the infant to Mr. Finn until further order of the court. While the appeal was pending in the Appellate Division, we certified the matter on our own motion.

"The facts are not in dispute. Appellants were the parents of the infant, John Perricone, who was admitted to the Pollak Hospital on March 1, 1961. At that time John was described as 'a blue child[,] ** blue around the lips and on the nail beds, both on fingers and toes, and who showed clubbing of the fingers and the toes, which is evidence of chronic oxygen lack ***. On further physical examination it was noted that his heart was enlarged primarily on the right side, that the heart rhythm was regular; that the second sound, the left upper chest, which is usually re-duplicated, was single in nature and at this location there was a moderately loud murmur that occurred during the contraction of the heart.'

"When the infant was admitted, Mrs. Perricone consented to the performance of such surgical operations as the physicians of the hospital thought necessary for the boy's welfare. Although this consent had no restrictions, the infant's 'Progress Record' contained the notation: 'Parents are Jehovah Witnesses -request no usage of blood transfusions.' The physicians sought to treat John without the use of blood transfusions until they thought such transfusions were essential. At that point they requested permission from the Perricones to administer blood. When permission was denied, Mr. Finn applied through County Counsel to the Assignment Judge of Hudson County 'to have a special guardian appointed for this child for the express and sole purpose of having the necessary medical attention given to the child in the form of blood transfusions, which the physicians believe to be necessary.' ...

"Dr. Martin Frank, one of the two physicans who had attended the child, testified that the infant was in danger of death... . According to Dr. Frank, the hospital had attempted procedures other than blood transfusions to treat the child 'but none of these [is] as effective as the blood itself would be.' ...

"Dr. Gilbert E. Levinson, the only other doctor who had examined the child, corroborated Dr. Frank's testimony. Transfusions, he asserted, would free the child of possible neurological disability also. ...

"Appellants produced no medical witness. The father testified that he is a member of Jehovah's Witnesses and that his sole reason for refusing to permit a blood transfusion was based upon passages in their Bible, ...

"On the basis of these facts the order sought was issued. Yet in spite of the blood transfusions finally administered, the child died.

"[1] Both sides urge us not to dismiss the case as moot because of the death of the infant. They strongly emphasize the public importance of a decision which would settle the question so that parents, physicians and hospitals will have proper legal guidance. With this we concur. The public interest requires us to decide the cause. ...

"On this appeal the Perricones argue that their constitutional rights of parental care and religious freedom have been violated, that the court was without jurisdiction to take custody of the child from them... They contend also that it is not within the competency of courts to say what is or what is not reasonable in reference to religious beliefs. ...

"[2] Concededly, freedom of religion and the right of parents to the care and training of their children are to be accorded the highest possible respect in our basic scheme. ... But 'neither rights of religion nor rights of parenthood are beyond limitation.' ... In Reynolds v. United States, 98 U.S. 145, (1879), the Supreme Court upheld a Mormon's conviction for bigamy against the defense of interference with religious freedom as guaranteed in the First Amendment. Chief Justice Waite there stated: 'Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?'

"In Prince the court held that Massachusetts, acting to safeguard the general interest and well-being of its youth, could prohibit a child of a Jehovah's Witness parent drom distributing religious pamphlets on the street even though the child was accompanied by her adult guardian. The court observed: 'The right to practice religion freely does not include liberty to expose *** the child *** to ill health or death.' ...

"[3] The facts in the instant case clearly evidence a more compelling necessity for the protection of a child's welfare than those in Prince. And the arguments presented in the above cases are of equal force and effect with respect to Article I, par. 3 of the New Jersey Constitution. We hold, therefore, that neither N.J.S.A. 9:2-9 nor the action of the trial court pursuant to the statute is violative of either the Federal or the State Constitution. ...

"[5] Respondent concedes that appellants evidenced sincere parental concern and affection for their child. But those are not the controlling factors. Thus, courts have held that the refusal of parents, on religious grounds, to submit their infant child to a blood transfusion necessary to save its life or mental health amounted to statutory neglect, and therefore it was proper to appoint a guardian and to award custody to him for the limited purpose of authorizing transfusions. ...

"...appellants contend that as blood transfusions are not universally recognized as beneficial or safe, the trial court was in error in authorizing the guardian to permit the treatment. ...

"Concededly, medicine and surgery are not yet exact sciences and the result of any given operation or treatment cannot be foretold with complete accuracy. However, courts can be guided only be the prevailing medical opinion. Had there been a relevant and substantial difference of medical opinion about the efficacy of the proposed treatment or if there were substantial evidence that the treatment itself posed a significant danger to the infant's life, a strong argument could be made in favor of appellants' position. No such evidence was here presented. The medical testimony was unanimous in its endorsement of the necessity for immediate blood transfusions. ...

"In passing we note that the appointment of a special guardian was not intended to reflect adversely upon appellants' general standing and conduct as parents.

"Affirmed, no costs."

Reynolds v. United States, Vol. 98 U.S. Reports, pp. 145-169, (1879).

(Upholding a Mormon's conviction of bigamy against a defence of interference with religious freedom.)

An edited version of this decision is contained in:

Konvitz, M.R. *Bill of Rights reader: leading constitutional cases*, 4th ed. Ithaca. Cornell University Press. p. 50. 1968.

Module 5

"The case of Sharon Garber," *Religious freedom.* pp. 32-36, 47.

Deals with the problem of whether religious freedom includes the right to be let alone, to to the extent of disobeying laws enacted for the public welfare. From an Amish family, Sharon Garber became the center of the case of Kansas v. Garber when she did not attend formal schools beyond grade eight.

Padover, S.K. *The complete Jefferson.* New York. Duell, Sloan & Pearce, Inc. 1943.

Relevant passages contained in "Query XVII," pp. 673-676, from *Notes on the State of Virginia* (1881), which discusses religion and the church-state relationship in Virginia and other states. Also contains "A Bill for Establishing Religious Freedom," pp. 946-948.

Foner, P.S., ed. *The basic writing of Thomas Jefferson.* Garden City. Halcyon House. 1950.

Also contains"Query XVII" and "A Bill for Establishing Religious Freedom" as well as other writings.

Engel v. Vitale, Vol. 370 U.S. Reports, p. 421 (1962).

The Supreme Court determines that "non-denominational" prayer in the public schools violates first amendment provision for freedom of religion. See resource section for Understanding VIII of Module III, p. 78 for references.

School District v. Schempp, Vol. 374 U.S. Reports, p. 203 (1963).

The Supreme Court determines that Bible reading in a religious exercise in public schools violates first amendment provision for freedom of religion. See resource section for Understanding VIII of Module III, p. 78 for references.

"The case of William Murray," *Religious freedom.* pp. 41-47.

Deals with the issue of whether prayer exercises in a public school can be truly voluntary.

Module 5

West Virginia Board of Education v. Barnett, Vol. 319 U.S. Reports, pp. 624-671 (1943).
Upholds students' right not be expelled for failure to participate in "Pledge of Allegience."

An edited version of this decision is contained in:

James, L.F. *The Supreme Court in American life.* Fair Lawn, N.J. Scott, Foresman and Company. 1964. pp. 144-146.

Konvitz, M.R. *Bill of Rights reader: leading constitutional cases,* 4th ed. Ithaca. Cornell University Press. 1968. p. 220ff.

Mill, E.W. *Liberty and law: readings in American government.* Morristown, N.J. Silver Burdett Company. 1971. pp. 138-145.

Tresolini, Rocco. *These liberties: case studies in civil rights.* New York. Lippincott Company. 1968. pp. 193-202.

See also:

Frain v. Baron, Vol. 307 Federal Supplement, pp. 27-34 (1969).
Also upholds students' right not to be expelled for not participating in "Pledge of Allegience."

Sheldon v. Fannin, Vol. 221 Federal Supplement, pp. 766-776 (1963).
Upholding students' right not to be expelled for failure to participate in singing the National Anthem.

"The facts are without controversy, and may be briefly stated. On September 29, 1961, the plaintiffs were suspended from Pinetop Elementary School for insubordination, because of their refusal to stand for the singing of the National Anthem. This refusal to participate, even to the extent of standing, without singing, is said to have been dictated by their religious belief as Jehovah's Witnesses, requiring their literal acceptance of the Bible as the Word of Almighty God Jehovah. Both precedent and authority for their refusal to stand is claimed to be found in the refusal of the three Hebrew children Shadrach, Meshach and Abednego, to bow down at the sound of musical instruments playing patriotic-religious music throughout the land at the order of King Nebuchadnezzar of ancient Babylon. [Daniel 3:13-28.] For a similar reason, members of Jehovah's Witnesses sect refuse to recite the Pledge of Allegiance to the Flag of the United States, viewing this patriotic ceremony to be the worship of a graven image. [Exodus 20:4-5.]

However, by some process of reasoning we need not tarry to explore, they are willing to stand during the Pledge of Allegiance, out of respect for the Flag as a symbol of the religious freedom they enjoy. [See West Virginia State Board of Education v. Barnette, 319 U.S. 264,...]

'...The right to believe, to speak, to act, in the exercise of freedom of expression, like all legal rights under our common-law system of justice, presupposes the correlative legal duty always to do whatever is reasonable, and to refrain from doing whatever is unreasonable, under the circumstances; and hence these fundamental rights are ever subject to such abridgements or restraints as are dictated by reason. . .

"But we so prize freedom of expression—deem it so essential to the maintenance of 'a government of laws and not of men'—that the bounds of restraint upon First Amendment rights which will be tolerated as reasonable are narrow in the extreme.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' [West Virginia State Board of Education v. Barnette, 319 U.S. 624,...].

"...The standard of permissible restraint upon freedom of speech applies as well to freedom of religion. Thus, although the State may not establish a religion, it may curtail religious expressions by word or deed which create a clear and present danger of impairing the public health or safety... .

"...Where...a particular application of a general law not protective of some fundamental State concern materially abridges free expression or practice of religious belief, then the law must give way to the exercise of religion. ...

"Clearly, then, if the refusal to participate in the ceremony attendant upon the singing or playing of the National Anthem had not occurred in a public school classroom, but in some other public or private place, there would be not the slightest doubt that the plaintiffs were free to participate or not as they choose. Every citizen is free to stand or sit, sing or remain silent, when the Star Spangled Banner is played.

"...The singing of the National Anthem is not a religious but a patriotic ceremony, intended to inspire devotion to and love of country. Any religious references therein are incidental and expressive only of the faith which as a matter of historical fact has inspired the growth

of the nation. ... The Star Spangled Banner may be freely sung in the public schools, without fear of having the ceremony characterized as an 'establishment of religion' which violates the First Amendment.

"...In view of the plaintiffs' avowed willingness to stand for the Pledge of Allegiance to the Flag, it may strain credulity that their claim of religious objection to standing as well for the National Athem is bona fide or sincere. But all who live under the protection of our Flag are free to believe whatever they may choose to believe and to express that belief, within the limits of free expression, no matter how unfounded or even ludicrous the professed belief may seem to others. While implicitly demanding that all freedom of expression be exercised reasonably under the circumstances, the Constitution fortunately does not require that the beliefs or thoughts expressed be reasonable, or wise, or even sensible. The First Amendment thus guarantees to the plaintiffs the right to cliam that their objection to standing is based upon religious belief, and the sincerity of reasonableness of this claim may not be examined by this or any other Court. ...

"Accepting, then, the plaintiffs' characterization of their conduct as religiously inspired, this case is ruled by West Virginia State Board of Education v. Barnette, 319 U.S. 624,...(1943), where the Supreme Court held unconstitutional the expulsion of Jehovah's Witnesses from a public school for refusal to recite the Pledge of Allegiance to the Flag. The decision there rested not merely upon the 'free-exercise clause', but also upon the principle inherent in the entire First Amendment: that governmental authority may not directly coerce the unwilling expression of any belief, even in the name of 'national unity' in time of war. ...

"...there is much to be said for the view that, rather than creating a disciplinary problem, acceptance of the refusal of a few pupils to stand while the remainder stand and sing of their devotion to flag and country might well be turned into a fine lesson in American Government for the entire class.

"This is not to suggest, however, that freedom of expression permits any ruly or boisterous conduct of word or deed which is in fact disruptive of order or discipline in the classroom or the school, or to suggest that the school must award a passing mark or grade to a student who refuses or fails to do required school work.

"Since it appears that the conduct of the pupils involved here was not disorderly and did not materially disrupt the conduct and discipline of the school, and since there is a lack of substantial evidence that it will do so in the future, a writ of injunction will issue permanently restraining the Board of Trustees of Pinetop Elementary School from excluding the plaintiffs from attendance at the school solely because they silently refuse to rise and stand for the playing or singling of the National Anthem. ..."

McKinney's Consolidated Laws of New York. Vol. 19 "General Business.". Section 136d.

Section 136. Exhibition or display of the flag

"Any person who:...

"d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act, ...

"Shall be guilty of a misdemeanor." ...

Street v. New York, Vol. 394 U.S. Reports, pp. 576-617 (1969).

Prohibition of contemptuous words against the flag determined to be an unconstitutional restriction of free expression.

"Appellant, having heard a news broadcast of the shooting of James Meredith, a civil rights leader, took an American flag which he owned to a street corner near his home in New York and ignited the flag. He was arrested and thereafter charged by information with malicious mischief for violating...the New York Penal Law, which makes it a crime publicly to mutilate or 'publicly [to] defy...or cast contempt upon [any American flag] either by words or act.' The information charged appellant with burning the American flag and publicly speaking defiant or contemptuous words about the flag. Appellant unsuccessfully moved to dismiss the information on the ground that the statute violated his constitutional right to free expression by punishing him for activity which he contended was a constitutionally protected 'demonstration' or 'protest.' Appellant was tried before a judge without a jury and convicted. The arresting officer testified that at the time of arrest appellant was standing on a corner speaking to a small and not unruly group, which did not block the street or sidewalk; on the opposite corner was the burning flag; appellant told the group: 'We don't need no damn flag,' and said to the officer, 'If they let that happen to Meredith, we don't need an American flag.' ...

"MR. JUSTICE HARLAN delivered the opinion of the Court. ...

"We next consider whether it is our duty to reverse if we find,...that Street's words could have been an independent cause of his conviction and that a conviction for uttering such words would violate the Constitution.

"That such is our duty is made apparent by a number of decisions of this Court. In the leading case of *Stromberg v. California*, 283 U.S. 359 (1931)... . This Court said:

"'The verdict against the appellant was a general one. It did not specify the ground upon which it rested. ... [I]t is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses...was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. ... It follows that...the conviction cannot be upheld.' ...

"Moreover, even assuming that the record precludes the inference that appellant's conviction might have been based *solely* on his words, we are still bound to reverse if the conviction would have been based upon *both* his words and his act. This is made apparent by *Thomas v. Collins*, *supra*. ...

"As in *Thomas*, appellant here was charged with two acts violative of the statute: burning a flag and publicly speaking defiant or contemptuous words about the flag; and evidence was introduced to show the commission of both acts. Here too the verdict was general and the record negates the possibility that the conviction was based on both alleged violations, *Thomas* dictates that '[t]he judgment...must be affirmed as to both or as to neither.'

"We take the rationale of *Thomas* to be that when a single-count indictment or information charges the commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together. ...

"We turn to considering whether appellant's words could have been the sole cause of his conviction, or whether the conviction could have been based on both his words and his burning of the flag. ...

"The State argues that appellant's words were at most used to establish his unlawful intent in burning the flag. However, after a careful examination of the comparatively brief trial record, we find ourselves unable to say with certainty that appellant's words were not an independent cause of his conviction. While it is true that at trial greater emphasis was placed upon appellant's action in burning the flag than upon his words, a police officer did testify to the utterance of the words. The State never announced that it was relying exclusively upon the burning. The trial judge never indicated during the trial that he regarded appellant's words as relating solely to intent. The judge found appellant guilty immediately after the end of the trial, and he delivered no oral or written opinion.

"In the face of an information explicitly setting forth appellant's words as an element of his alleged crime, and of appellant's subsequent conviction under a statute making it an offense to speak words of that sort, we find this record insufficient to eliminate the possibility either that appellant's words were the sole basis of his conviction or that appellant was convicted for both his words and deed.

"We come finally to the question whether, in the circumstances of this case, New York may constitutionally inflict criminal punishment upon one who ventures 'publicly [to] defy... or cast contempt upon [any American flag] by words. ...'

"...Appellant's words, taken alone, did not urge anyone to do anything unlawful. They amounted only to somewhat excited public advocacy of the idea that the United States should abandon, at least temporarily, one of its national symbols. It is clear that the Fourteenth Amendment prohibits the States from imposing criminal punishment for public advocacy of peaceful change in our institutions. ... Even assuming that appellant's words might be found incitive when considered together with his simultaneous burning of the flag, § 1425, subd. 16, par. d, does not purport to punish only those defiant or contemptuous words which amount to incitement, and there is no evidence that the state courts regarded the statute as so limited. Hence, a conviction for words could not be upheld on this basis. ...

"Nor could such a conviction be justified on...the possible tendency of appellant's words to provoke violent retaliation. Though it is conceivable that some listeners might have been moved to retaliate upon hearing appellant's disrespectful words, we cannot say that appellant's remarks were so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.' And even if appellant's words might be found within that category, § 1425, subd. 16, par. d, is not narrowly drawn to punish only words of that character, and there is no indication that it was so interpreted by the state courts. ...

"Again, such a conviction could not be sustained on the ground that appellant's words were likely to shock passers-by. Except perhaps for appellant's incidental use of the word 'damn,' upon which no emphasis was placed at trial, any shock effect of appellant's speech must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. ... And even if such a conviction might be upheld on the ground of 'shock,' there is again no indication that the state courts regarded the statute as limited to that purpose.

"Finally, such a conviction could not be supported on the theory that by making the above-quoted remarks about the flag appellant failed to show the respect for our national symbol which may properly be demanded of every citizen. In *Board of Educ. v. Barnette*, 319 U.S. 624 (1943), this Court held that to require unwilling schoolchildren to salute the flag would violate rights of free expression assured by the Fourteenth Amendment. ...

"We have no doubt that the constitutionally guaranteed 'freedom to be intellectually...diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous.

"Since appellant could not constitutionally be punished under § 1425, subd. 16, par. d, for his speech, and since we have found that he may have been so punished, he conviction cannot be permitted to stand. ...

"MR. CHIEF JUSTICE WARREN, dissenting.

"I dissent from the reversal of this judgment, not only because the Court in my opinion has strained to bring this trial within *Stromberg v. California*, 283 U.S. 359 (1931), but more particularly because it has declined to meet and resolve the basic question presented in the case. That question has been variously stated by the New York Court of Appeals and the parties. The court below employed the following statement of the question:

> "'We are called upon to decide whether the deliberate act of burning an American flag in public as a "protest" may be punished as a crime.' ...

"...The parties obviously believe that the constitutionality of flag-desecration statutes is before the Court. ... But the Court specifically refuses to decide this issue. Instead, it searches microscopically for the opportunity to decide the case on the peripheral *Stromberg* ground, holding that it is impossible to determine the basis for appellant's conviction. In my opinion a reading of the short trial record leaves no doubt that appellant was convicted solely for burning the American flag. ...

"MR. JUSTICE BLACK, dissenting.

"...It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense. It is immaterial to me that words are spoken in connection with the burning. It is the *burning* of the flag that the State has set its face

against. 'It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.' *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). In my view this quotation from the *Giboney* case precisely applies here. The talking that was done took place 'as an integral part of conduct in violation of a valid criminal statute' against burning the American flag in public. I would therefore affirm this conviction.

"MR. JUSTICE WHITE, dissenting.

"The Court has spun an intricate, technical web but I fear it has ensnared itself in its own remorseless logic and arrived at a result having no support in the facts of the case or the governing law.

"The Court's schema is this: the statute forbids insults to the flag either by act or words; the charge alleged both flag burning and speech; the court rendered a general judgment; since the conviction might logically have been for speech alone or for both words and deeds and since in either event the conviction is invalid, the judgment of the New York courts must be set aside without passing upon the validity of a conviction for burning the flag. I reach precisely the opposite conclusion; before Street's conviction can be either reversed or affirmed, the Court *must* reach and decide the validity of a conviction for flag burning. ...

"MR. JUSTICE FORTAS, dissenting.

"...The test that is applicable in every case where conduct is restricted or prohibited is whether the regulation or prohibition is reasonable, due account being taken of the paramountcy of First Amendment values. If, as I submit, it is permissible to prohibit the burning of personal property on the public sidewalk, there is no basis for applying a different rule to flag burning. And the fact that the law is violated for purposes of protest does not immunize the violator. ...

"...A person may 'own' a flag, but ownership is subject to special burdens and responsibilities A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions. ...

"One may not justify burning a house, even if it is his own, on the ground, however sincere, that he does so as a protest. One may not justify breaking the windows of a government building on that basis. Protest does not exonerate lawlessness. And the prohibition against flag burning on the public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest."

Module 5

People v. Radich, Vol. 26 New York Reports, Second Series, p. 114-129 (1970).

Prohibition of contemptuous acts against the flag determined to be constitutional.

"Gibson, J. The issue is whether defendant's conviction of a violation of New York's flag desecration statute was in contravention of his right of speech under the First Amendment to the Constitution of the United States. The particular penal provision found to have been violated provides, in substance, that any person who shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon the flag of the United States of America, either by words or act, shall be guilty of a misdemeanor (former Penal Law, § 1425, subd. 16, par. d, now General Business Law, § 136, subd. d). The constitutional question in respect of the proscribed defilement by an 'act', rather than by 'words', was expressly left open in *Street v. New York* (394 U.S. 576, 594), which reversed our affirmance of a conviction under the same statute (*People v. Street*, 20 N Y 2d 231). We have concluded that the conviction in the case now before us infringed no constitutional guarantee.

"The defendant, the proprietor of an art gallery in the City of New York, publicly displayed and exposed for sale, certain 'constructions', comparable to sculptures, which had been fashioned by an artist as expressive of protest against the Vietnam war and which, in each case, prominently incorporated the American flag.

"The complaint, upon which defendant was charged and convicted, alleged, among other violations of the statute, that defendant publicly displayed the flag of the United States of America in the form of the male sexual organ, erect and protruding from the upright member of a cross; also in the form of a human body, hanging from a yellow noose; and, again, wrapped around a bundle resting upon a two-wheeled vehicle, shown by photographs in evidence to resemble a gun caisson.

"For the purposes of this opinion it seems necessary to discuss only the first of the constructions complained of. Testifying in his own behalf, the defendant said that this was protest art; and that during the exhibition of the constructions, background music, consisting of war protest songs, was played from a tape. Asked, on cross-examination, as to the use of the flag for the purpose of protest, he said that the object extending from the vertical member of the cross and wrapped in a small flag was representative of a human penis... Asked as to the particular expression and protest intended to be conveyed, the witness said that perhaps the penis represents the sexual act, which by some standards is considered an aggressive act; that organized religion is also symbolized by the figure, which seems to suggest that organized religion is supporting the aggressive acts suggested. ...

"While it seems well established that a clear violation of a valid statute may not be saved on First Amendment grounds, it is necessary in this case eventually to reach a somewhat different question, which is, whether or not the act said to constitute the violation is tempered by the application of the First Amendment. In other words, while burning, spitting, upon and stomping upon the flag are clearly and inherently disrespectful, do we reach a point where other acts may be performed with regard to the flag which do not so easily admit of the requisite contemptuousness; where the intent behind the act may be of the purest sort, but where the results of the act may nevertheless have the effect which, as Chief Judge Fuld found in *Street* the statute was validly designed to prevent—the arousement of passions likely to lead to disorder?...

"In *Hoffman v. United States* (256 A. 2d 567 [Ct. of App., D.C., 1969]), the defendant, who was to testify before the House Un-American Activities Committee, upon approaching the House Office Building was arrested for desecrating the flag, in that he was wearing a shirt that resembled the American flag. He was convicted of breaching that part of the statute which proscribed defilement of the flag. ... ...the court held that wearing the flag, or part of it, as a shirt was a rather clear act of defilement in that the flag was thus dishonored; that the idea of dishonorment was the key to the question whether the flag was defiled. ... Similarly, in *People v. Cowgill* (78 Cal. Rptr. 853...), the California court affirmed the conviction of a defendant for wearing a vest fashioned from a cut-up American flag, in violation of a flag defilement statute....

"The discussion thus far enables us to reach certain conclusions. It becomes clear,...that a person with the purest of intentions may freely proceed to disseminate the ideas in which he profoundly believes, but he may not break a valid law to do it. The flag statute has been repeatedly held valid...through *Hoffman v. United States (supra)* and *People v. Cowgill (supra)*, where the flag was not, in either case, burned, spit or trampled upon, but was used, in each case, to further political or ideological viewpoints by employment as an article of clothing. There appears no significant difference between those situations and the one we are here considering. The defendant may have a sincere ideological viewpoint, but he must find other ways to express it. Whether defendant thinks so or not, a reasonable man would consider the wrapping of a phallic symbol with the flag an act of dishonor; he would consider the hanging effigy a dishonor; and to a lesser and more debatable extent it might be found that wrapping the flag in chains, attaching it to a gas meter, and fashioning the other representations involved, were acts dishonoring the flag. The exhibitor who, as in this case, engages to join the artist in the commercial exploitation of the supposed expression of protest stands in no better position. ...

"The judgment should be affirmed.

"Chief Judge Fuld (dissenting). I cannot agree with the majority that sufficient legitimate public interest is served by preventing the sale and exhibition of works of art—such as those which formed the predicate for the conviction of the defendant Radich—to justify interference with his right to free expression. ...

"...in the absence of a showing that the public health, safety or the well being of the community is threatened, the State may not act to suppress symbolic speech or conduct having a clearly communicative aspect, no matter how obnoxious it may be to the prevailing views of the majority. ...

"Quite obviously, the act which was prosecuted in the *Street* case—the public burning of a flag on a street corner in a section of Brooklyn at a time when feelings undoubtedly ran high following the shooting of James Meredith—posed a threat to public order which the State could legitimately act to prevent. Indeed, in *Street* we likened the public mutilation of the flag to 'shouting epithets at passing pedestrians'...a situation patently fraught with danger to the public peace. The same may not, however, be said of the art forms which the defendant before us displayed in the quiet surroundings of his upstairs art gallery on Madison Avenue in midtown Manhattan. In our modern age, the medium is very often the message, and the State may not legitimately punish that which would be constitutionally protected if spoken or drawn, simply because the idea has been expressed, instead, through the medium of sculpture.

"Unlike the situation in the recent case of *Cowgill v. California* (396 U.S. 371, *supra*), the artist in the present case unquestionably made use of the flag for the purpose of expressing his political philosophy or views, his dissatisfaction with, and opposition to, the Vietnam War and other activities carried on by the Government. ... In a very real sense, therefore, it was not the artist's *act* of making use of the flag which is being punished but solely the *protest* or the political views he was seeking thereby to express.

"The judgment appealed from should be reversed.

"Judges Scileppi, Bergan, Breitel and Jasen concur with Judge Gibson; Chief Judge Fuld dissents and votes to reverse in a separate opinion in which Judge Burke concurs.

"Judgment affirmed."

McKinney's Consolidated Laws of New York, Vol 16 "Education Law" Section 801.

This provision mandated curriculum coverage concerning the principles of Federal and state constitutions as well as the Declaration of Independence. See resource section for Understanding V of Module I for section 801 in edited form.

UNDERSTANDING II

LAW IS LIMITED IN ITS CAPACITY TO DEAL WITH A SOCIAL PROBLEM WHENEVER THE MEMBERS OF THE SOCIETY DO NOT SUFFICIENTLY SUPPORT THE USE OF LAW IN THIS WAY.

A. *Explanation of Understanding II*

A second limit of the capacity of law to reach aims or solve problems concerns the relationship between law and other kinds of social controls. In trying to meet a social need, law may be inconsistent with factors such as popular morality or common custom. This may result in lack of support for the use of law to reach the desired social aim. Criminal prohibition of alcohol provides a familiar example in recent history. Reduction of the problems resulting from use of alcohol was a popular social aim. However, lack of support for law as the means for ending use of alcohol dramatically limited the capacity of law to reach this aim.

B. *Teaching Understanding II*

OBJECTIVES

- Given a case study of a law designed to prohibit certain conduct, the student can suggest procedures to measure the climate of society concerning that conduct and can predict the effectiveness of the law.

QUESTIONS TO REACH UNDERSTANDING

- What is the relationship between law and the other social controls that exist in our society?
- How does this relationship affect the capacity of law?

Module 5
DETAILED DESCRIPTION OF STRATEGIES

A. (1) The following relationships can be studied:
- Amendment XVIII and the aim of Prohibition
- The Volstead Act and the enforcement machinery for the prohibition of alcohol.

(2) Students may read and react to selections from the debate on the floor of the U.S. Congress on the proposal of the prohibition Amendment (XVIII) to the U.S. Constitution. Once students have a "feel" for the actual debate, some may want to dramatize it in a skit.

(3) Have students read selections on the prohibition era from social histories like Frederick L. Allen's Only Yesterday. Teacher and students may read some passages aloud in class.

(4) Invite a faculty member or other member of the community who experienced the prohibition era speak to the class.

(5) Have students view a motion picture or filmstrip dealing with the era of prohibition. The following might be considered. Discussion should focus upon society's attitude compared with the "message" of prohibition.
- "Golden Twenties" - film
- "Jazz Age 1919-1929" - film
- "The Reckless Years 1919-1929" - filmstrip

DISCUSSION OF STRATEGIES AND RESOURCES

All of the activities in Strategy A are related to Prohibition and a combination of them may be made to constitute a case study developing the understanding. In such a study, consideration should focus upon how the lack of public support for the prohibition of alcohol through law limited the effectiveness of law. Amendment XXI can then be seen as an example of change in law to coincide with non-legal values of society.

The widespread disregard of criminal prohibition of alcohol consumption in the 1920's has been well documented. It is probably a safe assumption that this was due in large part to widespread lack of public support for these laws. Senior members of the high school faculty might provide firsthand testimony on the proposition.

A second set of activities will constitute a case study of the limitations of law in dealing with the social problem of marijuana abuse.

Current field research indicates that there is widespread growing disregard of prohibitions of marijuana use. The degree of public support of these laws is hard to evaluate. It is evident that at least a significant minority of citizens do not support these laws. There may be a causal connection between this and the growing ineffectiveness of these laws in reducing marijuana use.

DETAILED DESCRIPTION OF STRATEGIES

DISCUSSION OF STRATEGIES AND RESOURCES

B. (1) Students may examine a state criminal statute that prohibits and punishes the sale, use, and possession of marijuana. Have students consider the aims of the present law.

(2) Divide the class into several groups and have each group read excerpts from current literature on marijuana use. The excerpts should reflect the medical uncertainty and range of opinion that exists regarding the damaging effects of marijuana on mental and physical health. In a fishbowl or other followup format, discussion should be directed toward a consideration of how the uncertainty over the harmful effects of marijuana might affect the degree to which the law will be observed.

(3) Invite a speaker from the local health department or drug clinic to speak on the conflict of opinion about the dangers of marijuana. As a followup, discuss how the lack of certainty about harmful effects undermines laws prohibiting its use.

(4) View a filmstrip; for example, "Marijuana: What Can You Believe?" Follow the viewing with a discussion of how uncertainty about harmful effects reduces the law's effectiveness in prohibiting marijuana use.

(5) Organize a class discussion on the difference between the letter of the laws on marijuana and conduct condemned in society. Have

students attempt to account for the disparity and determine how the social climate of opinion limits the capacity of law.

(6) Invite a local criminal court judge or member of the district attorney's staff to speak to the class on the incidence of arrest and prosecution for sale, use, and possession of marijuana and how such cases are actually disposed of in (or outside of) court with emphasis on whether or not the law is being carried out. Have students consider how the lack of consensus within society relates to the effectiveness of the law.

Use the New York State Bar Association's Mock Trial program. In the debriefing exercise at the end of the project, direct some of the analysis toward the way the audience—that is, society—would perceive the boys involved in the case.

RESOURCES*

United States Constitution, Amendment XVIII - (1919 Prohibition).

National Prohibition Act ("Volstead Act") - Chapter 85 of the United States Law of 1919 in Vol. 41, United States Statutes at Large, pp. 305-323.

(See resource section for Understanding IV of Module II for an edited version of this act.)

U.S. Congressional Record, Vol. 52, Part 1, pp. 495-620. (63rd Congress, 3d Session, December 22, 1914; Debate in the House on the proposal of the prohibition amendment to the Constitution.) Selected excerpts are collected in a pamphlet, *The Pros and Cons of Prohibition*, 1915. See excerpts below.

Representative Richmond P. Hobson, of Alabama

"Some are trying to defend alcohol by saying that its abuse only is bad and that its temperate use is all right. Science absolutely denies it, and proclaims that drunkenness does not produce one-tenth part of the harm to society that the widespread, temperate, moderate drinking does. Some say it is adulteration that harms. Some are trying to say that it is only distilled liquors that do harm. *Science comes in now and says that all alcohol does harm; that the malt and fermented liquors produce vastly more harm than distilled liquors, and that it is the general public use of such drinks that has entailed the gradual decline and degeneracy of the nations of the past.*

"We do not say that a man shall not have or make liquor in his own home for his own use. Nothing of that sort is involved in this resolution. We only touch the sale. A man may feel he has a right to drink, but he certainly has no inherent right to sell liquor. A man's liberties are absolutely secure in this resolution.

"Alcohol is produced by the process of fermentation, which process ferment germs devour glucose in solution derived from grain, grapes, and other substances and in their life processes they throw of waste products like other living organisms. One of the waste products is the gas that causes bubbling. The other waste product is the liquid alcohol. Alcohol is then the toxin, the loathsome excretion of a living organism. It comes under the general

*Direct quotations from statutes are indicated by the use of quotation marks. Other statements are summaries or paraphrases of the statute listed.

law governing toxins, namely, the toxin of one form of life is a poison to the form of life that produced it and a poison to every other form of life of a higher order. The ferment germs are single-cell germs—the lowest form of life known—consequently their toxin, alcohol, is a poison to all forms of life, whether plants, animals, or men—a poison to the elemental protoplasm out of which all forms of life are constructed.

"We must therefore surrender all our preconceived ideas about the supposed food value and benefits of alcohol, even in the simplest quantities. As an illustration, one mug of mild beer—supposed to be beneficial and helpful—will in thirty minutes lower the efficiency of the average soldier 36 per cent in aiming his rifle. ...

"When the great war in Europe is over it will be found that the sum total killed on the field of battle for all nations will average less than 1,500 a day. Alcohol averages 2,000 Americans a day. *Europe is really in the eyes of nature better off today in the midst of her great tragedy than she has been for centuries because Europe is almost dry.* ...

"Some vast agent in our midst is systematically teaching the boys to drink and debauching the youth. Who is it that carries on this sinful business? Certainly it is not the drinkers. A man may drink, but unless he is a hopeless degenerate he would not teach boys to drink. I have known many drinkers, but I have never yet known one who made a habit of teaching boys to drink. *This sinister agent is the Liquor Trust of America.*

"Tens of thousands of paid agents all over the land are carrying out this devilish work. The most deadly work thus far has been in the cities, where it is hard for parents to keep track of their boys, but it extends to towns and is now being systematically extended to country settlements. The usual method in cities is to operate where boys come together, sometimes having the boys rendezvous in saloons, but more frequently in pool rooms and other places of amusement, sometimes on vacant lots. The bootlegger or licensed agent of the Liquor Trust arranges to have the boys drink before breaking up to be sociable or as a sign of manliness. ..."

Representative Oscar W. Underwood, of Alabama

"...The progress that the world has made in morality comes from the heart, following the teachings of God, and not from the force of men.

"Of the taxes levied on liquors, $226,200,000 were received from internal revenue and $19,200,000 from customs, making the total of $245,400,000. Aside from the Federal revenue

I find that the revenue derived by the States from incorporated places having a population of 2,500 and over $52,000,000, or a total that the States derived from liquor licenses of $79,600,000. This makes the total in the United States from all sources $325,000,000.

"Mr. Speaker, if all revenue derived from the sale of liquor should be destroyed to accomplish a good purpose, it might be well to destroy this source of revenue and place the burden of taxation elsewhere, but I contend that if you adopt the pending resolution you will not accomplish the end you aim at, real temperance, but you will transpose law into license and establish national tyranny in place of local justice. *You would not prevent the drinking of liquor or the evils that grow out of it, but you would destroy the supervision of the liquor traffic by local authority.* You would destroy this revenue and the evils of intemperance would still exist. ...

"Some of the advocates of this resolution laugh when it is suggested to them that should the Constitution of the United States be amended in this particular it would confiscate millions of dollars of property of law-abiding citizens. *Scorn may be the answer of the fanatic, but the just man will consider the facts. He will realize that a sentiment that may destroy his neighbor's property today may carry his own to the shambles of tomorrow.*

"In 1900 there was invested in the liquor industry of the United States $771,516,000. At that time this industry employed 77,779 persons, their annual wage amounting to $70,907,000.

"For one, I am not prepared to say that when property is destroyed, if it is destroyed for the public good, that the owner of that property should not receive compensation, nor do I believe that the sentiment of the American people is in accord with the declarations we have heard from some of the proponents of this resolution favoring destruction of property without compensation by law. ...

"Census Bulletin 112, on Mortality Statistics for 1911, at page 77, shows the death rate per 100,000 population from violent deaths, excluding suicide, for certain cities in specified States.

"The census investigation in 1911 shows that the average death rate by violence, exclusive of suicide, for cities investigated in 29 States in which liquor was lawfully sold was lower than that of Kansas, for many years a prohibition State. In three it was higher. In six prohibition States investigated, Tennessee and West Virginia show a higher death rate than Kansas.

"Bulletin 112 of the Bureau of the Census, on Mortality Statistics for 1911, at page 77, shows the death rate from suicide per 100,000 population for certain cities in specified States.

"The table shows that cities were investigated in 38 States. Twenty States show a lower average death rate from suicide where liquor is lawfully sold than Kansas. Eleven show a higher death rate than Kansas. Of the prohibition States, West Virginia was the only one having a higher average rate than Kansas.

"Census Bulletin No. 96, on Marriage and Divorce, page 42, shows the annual average divorce rate per 100,000 married population by States in 1900.

"It shows that 27 States in which liquor is lawfully sold have a lower divorce rate than Kansas, and that 13 States in which liquor is lawfully sold have a higher rate. Oklahoma is the only prohibition State having a higher divorce rate than Kansas."

Representative John R. Connelly, of Kansas

"I am glad to speak today for the splendid Commonwealth of prohibition Kansas. *A half million boys and girls tread her highways who never saw a place where liquor was legally sold and a hundred thousand of them never saw a drunken man nor do they know the taste of liquor. ..."*

Representative James R. Mann, of Illinois

"Mr. Speaker, I am for morality and against immorality. *I am for decency and against indecency. I am for temperance and against drunkenness. I am for virtue and against vice. I am for law and order and against crime and disorder.* I am for the right and against the wrong. So are we all. But, notwithstanding my sentiments and our sentiments universally, I am not able to vote for the resolution now pending or for what I suppose will be offered as a substitute for it. ...

"...There is not a word in the resolution of the proposed amendment which looks to the prohibition of the manufacture of alcohol, or even of alcoholic beverages, unless they are for sale. ...

"...Do you propose by this amendment to have the Government or a Government officer or agent or spy, as you may please to call him, in every township in the United States to

detect the production of an article which a farmer or a laborer in his cellar can produce without expense and without publicity, and when when produced is still legal under the amendment unless it be made for sale?

"You say the States cannot control it. If the people of a locality cannot enforce their local laws, it will never be possible for the National Government successfully to enforce them.

"COLLOQUY BETWEEN HOBSON AND MANN.

"Mr. HOBSON. Will the gentleman yield for a question?

"Mr. MANN. Yes.

"Mr. HOBSON. Is the gentleman from Illinois in favor of having the Constitution prohibit the use of intoxicating liquors or any kind of sumptuary regulation?

"Mr. MANN. Is the gentleman from Alabama in favor of it?

"Mr. HOBSON. *I am against it.*

"Mr. MANN. This is what the gentleman's proposition is, sumptuary legislation. I am opposed to any proposition which will bring before the country all the time an issue which will make everything else in the country, at every election in the country, swing around the enforcement of a prohibition amendment which cannot be enforced. [Applause.] If we are to submit to the people and have them pass upon the question of prohibiting intoxicating liquors in the country, I am in favor of submitting to them that proposition and abiding by their judgment. *The gentleman from Alabama wants to submit a proposition which, if it shall be adopted as a part of the Constitution, will cause more misery, more 'blind pigging,' more 'bootlegging,' the consumption of more liquor improperly, more temptation to the youth of the land than is now the case. If we are to prohibit, let us prohibit.* [Applause.]

"Mr. HOBSON. Mr. Speaker, I do not desire to prolong the discussion, but I will say to the gentleman from Illinois that while I disagree with him about the enforcement, knowing, as my investigation shows, that blind pigs and blind tigers and other violations of the law are maintained by the Liquor Trust. I do not believe that it is

still a necessity. But suppose they did, I would rather have them than have this great monster. Elections today do revolve about the great Liquor Trust of America, and the object of forbidding the sale is to avoid even a suspicion of any desire to impose sumptuary legislation upon the American people or invade the rights of the individual and the home. *We do not propose that the gentleman from Illinois, either now or at any future time, shall prescribe to the friends of temperance and prohibition and the moral forces of America how to bring about prohibition in this country.*

"Mr. MANN. Mr. Speaker, if I had done no more for the moral forces of America than has the gentleman from Alabama, I would not speak. I have accomplished more in this House for the good morals while the gentleman was drawing pay on the Chautauqua circuit than he ever has or ever will. [Applause.]"

Representative Frederick H. Gillett, of Massachusetts

"We tried prohibition in Massachusetts years ago, when I think it was quite as law-abiding as it is now, and the results were so deplorable, the refusal of juries to to convict so scandalous and corrupting, that we abandoned the attempt and adopted local option, and under it the plague spots are gradually being surrounded and confined and narrowed, and the State is substantially dry, except in the cities, where the sale of liquor is constantly being restricted. ..."

Representative Robert L. Henry, of Texas

"Mr. Speaker, there can be but one honest argument made by the prohibitionists in favor of a national prohibition, and that is, State prohibition has proved a failure. If it has proved a failure in the State, it is because it is not supported by public sentiment in the State. *If it has proved a failure because of the non-support of public sentiment in the State, how much more reason have we to believe that this law will not be obeyed because it will not have national sentiment behind it!"* ...

Representative Richard Wayne Parker, of New Jersey

"Mr. Speaker, I am an advocate of temperance. I do not believe that this resolution stands for temperance. I know that temperance is best secured—and I have been studying this subject for 30 years now in legislation, beginning in the year 1885—by careful regulations, including sufficient license fee to provide the means for careful supervision

so as to watch the saloons and guard against any ills. These careful regulations must be supported by the enlightened public sentiment of the community, and in my opinion anything else will be an absolute failure. *We are given the example of the State of Georgia. It has an absolute prohibition upon its statute books, and if you will go to the city of Savannah you will find that town wide open, because the people will not enforce the law. ...*"

Representative Edwin Y. Webb, of North Carolina

"Now, I do not think it is pertinent to argue here the possibilities of sometime in the future destroying a large source of revenue. That, again, is for the States to pass upon. I know my friend [MR. UNDERWOOD] has been caring for the revenues of the Government and doing it well. His mind dwells upon that idea. *National prohibition would be a destruction to revenue, and big revenues, too, but that is a question that comes up in every prohibition fight.* When you want to close the great running sores of society—the barrooms, as any mercenary man will tell you—you lose your revenues and you cannot educate your boys unless you get revenue from the barroom. *I believe in education, but long ago I cam to the conclusion that rather than let my children be educated on barroom money I would let them grow up in ignorance!* [Applause.] That leads me to say that as sure as I stand before my friends here today the barroom as a public institution in this country is doomed. [Applause.] The time is coming when the people are not going to permit these things to exist much longer. I do not say the millennium is coming and people will cease to drink, but the time is coming fast when the men of this country are not going to permit these open barrooms where boys are lured to their death, where drinking is made attractive and where he comes in contact with the worst element of society. They are going to stop it; many men who drink whisky are going to stop it, and my belief is that before I reach the age of three-score years and ten, if I live that long, there will not be a legalized barroom in this broad land. [Applause.]" ...

Representative J. Campbell Cantrill, of Kentucky

"If State prohibition has built up 50,000 blind tigers in this country, how many more thousands will come as the result of national prohibition? The law can only be enforced in communities where public sentiment is back of it, and national prohibition to be enforced would require this country to be Russianized.

"Mr. Speaker, as a Representative of a great constituency on this floor, I do not believe that my people would call on me to cast a vote that would destroy millions of dollars worth of property of the citizens of any other State, without compensation of that property, *and therefore I will not cast my vote today to permit other States to destroy over one hundred and fifty millions of property belonging to the citizens of my State without compensation to my people.*

"There is in the land a great body of high-priced paid agitators who are clamoring for national prohibition. It is their profession, and Members of this House should not be swept off their feet by demands from that body. The paid leaders have not dealt fairly with the great body of the people in the country. They have misled thousands of sincere, honest, and God-fearing people into believing that this resolution means prohibition, when in reality it means unrestricted manufacture of intoxicating liquors. ..."

Representative Simeon D. Fess, of Ohio

"In many cases the wet cities have more speak-easies than dry cities. As I heard it said upon this floor, I do not care if we cannot prohibit it fully, close it up, we can drive it into the back alleys, put it in the third stories where the old soak might find it, but where our boys are not likely to go."

Representative Addison T. Smith, of Idaho

"Many of our most active temperance men throughout the country were only a few years ago indifferent to the cause of temperance, but after they had observed the great injury resulting from the traffic and considered the increase in our criminal population, and the increase in poverty and unemployment because of the drink habit, they had their eyes opened to the necessity of eradicating the saloons. *In dry counties and States the number of inmates in the jails has greatly decreased and there is less poverty and distress among the working classes.* With the eradication of the saloons the brewery buildings being turned into flour mills and factories, and the rooms formerly occupied by the saloons are being used for other lines of business. *The young men, instead of being tipplers and loafers, are turning their attention to business, the professions and trades, and making homes for their families. How any one can stand for the saloon in the light of crime, poverty, and broken hearts it is daily causing, is a mystery to me."*

Representative Francis O. Lindquist, of Michigan

"Zeppelins, submarines, bombs, and siege guns are not the only things that can destroy a nation. We do not need to wait for a foreign foe to invade our land to find it in peril. Our Nation is already in peril, and the foe is within our borders, making a mighty and devilish campaign to capture our cities. Yea, they have already been captured and they hold supreme power in almost every large city in our land.

Representative Horace W. Vaughan, of Texas

"The Constitution is so worded that a Member of Congress in voting for a proposed amendment votes not to refer it or submit it to the people, but that he deems it necessary and proposes it for ratification. Congress is required by the plain language of the Constitution to vote its judgment upon the proposition."

Allen, F.L. *Only yesterday: an informal history of the nineteen-twenties.* New York. Harper. 1957. (Originally published in 1931.) Reprinted by permission of Harper & Row, Publishers, Inc.

The following is an illustrative paragraph.

"If in the year 1919...you had informed the average American citizen that prohibition was destined to furnish the most violently explosive public issue of the nineteen-twenties, he would probably have told you that you were crazy. If you had been able to sketch for him a picture of conditions as they were actually to be—rum ships rolling in the sea outside the twelve-mile limit and transferring their cargoes of whisky by night to fast cabin cruisers, beer-running trucks being hijacked on the interurban boulevards by bandits with Thompson sub-machine guns, illicit stills turning out alcohol by the carload, the fashionable dinner party beginning with contraband cocktails as a matter of course, ladies and gentlemen undergoing scrutiny from behind the curtained grill of the speakeasy, and Alphonse Capone, multi-millionaire master of the Chicago bootleggers, driving through the streets in an armor-plated car with bullet-proof windows—the innocent citizen's jaw would have dropped. The Eighteenth Amendmen had been ratified, to go into effect on January 16, 1920; and the Eighteenth Amendment, he had been assured that he firmly believed, had settled the prohibition issue. You might like it or not, but the country is going dry."

McKinney's Consolidated Laws of New York. Vol. 39, "Penal Law." Article 220—Dangerous Drug Offenses, Sections 220.00-220.25. (Revised drug laws define narcotic drugs to include marijuana.)

Section 220.00 Dangerous Drug Offenses; Definition of Terms

"5. 'Cannabis' means all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted thereform), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination. ...

Section 220.02 Schedule of dangerous drugs

"The following substances are found and declared to be dangerous drugs:

"SCHEDULE I

"(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers is possible within the specific chemical designation:

...(d) Cannibis.

Section 220.5 Criminal possession of a dangerous drug in the sixth degree

"A person is guilty of criminal possession of a dangerous drug in the sixth degree when he knowingly and unlawfully possesses a dangerous drug.

"Criminal possession of a dangerous drug in the sixth degree is a class A misdemeanor.

Section 220.10 Criminal possession of a dangerous drug in the fifth degree

"A person is guilty of criminal possession of a dangerous drug in the fifth degree when he knowingly and unlawfully possesses a dangerous drug with intent to sell the same.

"Criminal possession of a dangerous drug in the fifth degree is a class E felony.

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Section 220.15 Criminal possession of a dangerous drug in the fourth degree

"A person is guilty of criminal possession of a dangerous drug in the fourth degree when he knowingly and unlawfully possesses a narcotic drug:

1. With intent to sell the same; or
2. Consisting of (a) twenty-five or more cigarettes containing cannabis; or (b) one or more preparations, compounds, mixtures or substances of an aggegate weight of (i) one-eighth ounce or more, containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or (ii) one-quarter ounce or more, containing any cannabis, or (iii) one half ounce or more, containing raw or prepared opium, or (iv) one-half ounce or more, containing one or more than one of any of the other narcotic drugs.

"Criminal possession of a dangerous drug in the fourth degree is a class D felony.

Section 220.20 Criminal possession of a dangerous drug in the third degree

"A person is guilty of criminal possession of a dangerous drug in the third degree when he knowingly and unlawfully possesses a narcotic drug consisting of (a) one hundred or more cigarettes containing cannabis; and (b) one or more preparations, compounds, mixtures or substances of an aggregate weight of (i) one or more ounces, containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or (ii) one or more ounces, containing any cannabis, or (iii) two or more ounces, containing raw or prepared opium, or (iv) two or more ounces, containing one or more than one of any of the other narcotic drugs.

"Criminal possession of a dangerous drug in the third degree is a class C felony.

Section 220.22 Criminal possession of a dangerous drug in the second degree

"A person is guilty of criminal possession of a dangerous drug in the second degree when he knowingly and unlawfully possesses a narcotic drug consisting of one or more preparations, compounds, mixtures or substances of an aggregate weight of eight ounces or more, containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or containing raw or prepared opium.

"Criminal possession of a dangerous drug in the second degree is a class B felony.

Section 220.23 Criminal possession of a dangerous drug in the first degree

"A person is guilty of criminal possession of a dangerous drug in the first degree when he knowingly and unlawfully possesses a narcotic drug consisting of one or more preparations,

compounds, mixtures or substances of an aggegate weight of sixteen ounces or more containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or containing raw or prepared opium.

"Criminal possession of a dangerous drug in the first degree is a class A felony.

Section 220.25 Criminal possession of a dangerous drug; presumption

"1. The presence of a dangerous drug in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such drug was found; except that such presumption does not apply (a) to a duly licensed operator of an automobile who is at the time operating it for hire in the lawful and proper pursuit of his trade, or (b) to any person in the automobile if one of them, having obtained the drug and not being under duress, is authorized to possess it and such drug is in the same container as when he received possession thereof, or (c) when the drug is concealed upon the person of one of the occupants.

"2. The presence of a narcotic drug in open view in a room under circumstances evincing an intent to unlawfully mix, compound, package or otherwide prepare for sale such narcotic drug, other than a public place, is presumptive evidence of knowing possession thereof by each and every person in close proximity to such narcotic drug at the time such drug was found... ."

Kolansky, Harold & Morre, W.T. "Effects of marihuana on adolescents and young adults." *Journal of the American medical association.* Vol. 216, No. 3, April 19, 1971. pp. 486-492. Reprinted by permission of Drs. Kolansky and Moore.

Study by two doctors linking mental ills to marijuana use. See excerpt below:

"The large amount of marihuana smoking (12 million to 20 million people) in this country was reviewed [in this study], as well as some of the literature concerning adverse effects. Thirty-eight individuals from age 13 to 24 years, all of whom smoked marihuana two or more times weekly, were seen by us between 1965 and 1970, and all showed adverse psychological effects. Some also showed neurologic signs and symptoms. Of the 20 male and 18 female individuals seen, there were eight with psychoses; four of these attempted suicide. Included in these cases are 13 unmarried female patients who became sexually promiscuous while using marihuana; seven of these became pregnant. ...

"...It is our impression that our study demonstrates the possibility that moderate-to-heavy use of marihuana in adolescents and young people without predisposition to psychotic illness may lead to ego decompensation ranging from mild ego disturbance to psychosis.

"Clearly, there is, in our patients, a demonstration of an interruption of normal psychological adolescent growth processes following the use of marihuana; as a consequence, the adolescent may reach chronological adulthood without achieving adult mental functioning or emotional responsiveness.

"We are aware that claims are made that large numbers of adolescents and young adults smoke marijuana regularly without developing symptoms or changes in academic study, but since these claims are made without the necessary accompaniment of thorough psychiatric study of each individual, they remain unsupported by scientific evidence. No judgment on the lack of development of symptoms in large, unselected populations of students or others who smoke marihuana can be made without such definitive individual psychiatric history-taking and examination."

Grinspoon, Lester, M.D. *Marihuana reconsidered.* Cambridge, Mass. Harvard University Press. 1971. Reprinted by permission.

Study which questions the validity of the conclusions about the dangers of marijuana. See excerpts below:

"It is a curious fact that while a great deal of attention has been devoted to the hypothesis that cannabis has a causal relationship to psychosis, very little has been written about the possibility that it might protect some people from psychosis. ...one would expect that the prevalence of psychoses among cannabis users would be greater than that of the general population. This does not appear to be so and suggests the possibility...that the use of this drug may indeed by protecting some individuals from psychoses. Here one might suppose that the drug serves to provide relief from, or at any rate dull, the impact of unbearable anxiety or an overwhelming reality. ...

"Another peculiarity of the marihuana literature is that it is replete with claims that the long term use of the drug leads to degeneracy. However, the few survey studies that exist, and are reasonably sound methodologically, generated data which fail to support this claim. ...

"...there are clinicians who have reported what they discern as personality change, and they relate this to the use of cannabis. I would agree that when a young person gives up a more or less conventional mode of living for one which is or is closer to that of the hippie, one may observe in him changes in behavior and attitude, changes which, taken together, may constitute what has been called the 'amotivational syndrome.' I am

not so certain, however, that these differences constitute personality change; it may be more accurate to consider them manifestations of a purposeful and extensive change in life-style, one involving ideology, values, attitudes, dress, social norms, and many aspects of behavior. This type of change may be likened to that which a girl who decides to join a convent may undergo; she certainly appears different with respect to her values dress, goals, behavior, and so forth, but beneath her habit the same pre-convent personality resides. Similarly, it seems more than likely that behind the hirsuteness and the hip patinas are personalities which have not undergone significant and basic change. ...

"If it is true that men use drugs to relieve feelings of frustration, anxiety, and helplessness, then we should not be surprised if the increasing use of marihuana is related to the gloomy threats of overcrowding, racial violence, and nuclear war. These same threats may indirectly, through displacement, be contributing affective energy to the repressive campaign against the use of marihuana. ... Thus, the anxiety and helplessness provoked by these frightening facts may be, to a greater or lesser extent, dealt with by some individuals through the *use* of marihuana, and by others, through displacement, by involvement in the crusade *against* the use of this drug. While both may be helpful, and even adaptive as far as individuals are concerned, neither contributes toward the development of a more secure world. ..."

Filmstrip

"Marijuana: What Can You Believe?" Pleasantville, New York. Guidance Associates.

United States President's Commission on Law Enforcement and Administration of Justice. *The challenge of crime in a free society*. Washington. U.S. Government Printing Office. 1967. pp. 224-225.

Brief survey of conflicting findings about dangers of marihuana use. The following passage dealing with the relationship of marihuana to crime and violence serves as an illustration.

"Here differences of opinion are absolute and the claims are beyond reconciliation. One view is that marihuana is a major cause of crime and violence. Another is that marihuana has no association with crime and only a marginal relation to violence." (p. 224.)

UNDERSTANDING III

LAW IS LIMITED IN ITS CAPACITY TO REALIZE TWO OR MORE VALID SOCIAL OBJECTIVES WHEN THEY CONFLICT WITH EACH OTHER.

A. *Explanation of Understanding III*

The third understanding examines what might be termed a logical limit of law. One way to measure law's effectiveness is to see how well it succeeds in reaching aims set for it. However, occasionally situations arise where two of the aims of law come into direct conflict. Examples from current events might come to mind: neighborhood solidarity vs. equal educational opportunity; free speech and assembly vs. maintenance of public order; or free press vs. maintenance of national security. A particular dispute that calls for legal resolution may throw such valid interests into direct conflict, conflict where one interest can only be fostered or protected at the expense of the other.

B. *Teaching Understanding III*

OBJECTIVES

- The student may apply a value clarification process, in determining which of two conflicting objectives should be supported by law.
- From newspapers or periodicals, the student can select five examples of conflicting societal objectives and for each example he can list arguments which might be advanced for legal backing of each side in the dispute.
- Using a real or a hypothetical situation involving his school community, the student can identify areas in which regulations cannot be absolute, and can suggest conditions which might modify the interpretation of the regulation to provide the greatest accomodation of all competing interests.

QUESTIONS TO REACH UNDERSTANDING

- How do conflicts between two basic legitimate values limit the capacity of law?
- Why are the particular circumstances of the conflict situation especially important when a value conflict is present?
- Should the presence of value conflict prevent the making of any legal decision?

DETAILED DESCRIPTION OF STRATEGIES

(a) Assign small study groups or individuals to read and analyze one or more of the cases below. The cases have been grouped according to the type of conflicting societal interests posed by the situation. Student study should be directed to identify this common thread among the cases within each grouping,* as well as to identify and reevaluate the validity of the interests represented by each contending party. Encourage role play within small groups or between pairs of students to help personalize the issues and to stimulate use of a value clarification process in considering the case under study. Class discussion should then deal with both the cognitive and affective aspects.

. Group A. Court decisions related to conflict between free expression v. public order and welfare*

- Tinker v. Des Moines School District
- Feiner v. New York
- Gregory v. Chicago

. Group B. Court decisions related to fair police procedures v. effective law enforcement*

- Terry v. Ohio
- Berger v. New York
- Miranda v. Arizona

*The titles of the grouping are given for teacher reference only; these are the common themes to be identified by the students, as they work within the groupings.

DISCUSSION OF STRATEGIES AND RESOURCES

Each suggested activity presents two legitimate interests of the legal system that are in direct conflict in the particular circumstances. Perhaps too often students tend to look at most conflict resolution as a process of selecting between a right and a wrong side. Often conflicts that find their way into court do not afford the law this luxury. The choice is frequently between valid conflicting interests—between right and right. In resolving such disputes, as the law must, simultaneous pursuit of each of the interests in conflict may be beyond the limits of law.

Our legal system seeks to protect free expression of views, regardless of their popularity. Free expression of divergent views and dissent serve both as a process for expanding knowledge and a process for securing liberty by subjecting government officials to public scrutiny. An equally fundamental interest in any legal system is preserving order in society in order to maintain security for persons or property.

Interest in free expression and interests in order are not compatible in all circumstances. In many instances unrestricted, peaceful free expression (the inflammatory speech, the schoolroom protest) may interfere with orderly operations of society. On the other hand, a society of maximum order might efficiently suppress all expression except that of official doctrine. Because such valid interests clash, law is limited in the extent to which it can simultaneously protect each. Instead, it must examine in detail situations where interests conflict and determine in each particular case which interest should be protected and which should give way.

DETAILED DESCRIPTION OF STRATEGIES

. Group C. Court decisions related to conflict between private property and neighborhood security v. equal opportunity*

- Lee v. Nyquist
- James v. Valtieria
- Shelley v. Kraemer

(b) Use a case study as the basis for a role-playing presentation. For maximum effectiveness this should be done with a court decision which the students have not yet read. The teacher can excerpt from the case the factual circumstances that gave rise to the particular dispute. With only these facts, two students for each side can argue the case before a bench of five, seven, or nine student-justices who decide the case on the basis of arguments presented, and explain their decision in a written opinion. Then the class might be interested in reading an edited version of the actual opinion to see how the case was resolved by an appellate court.

(c) Have students view a film depicting a dispute in which a valid interest of the legal system can be promoted only to the exclusion of other interests. Possible films include:

- "The Bill of Rights in Action: Freedom of Speech"
- "Interrogation and Counsel"

(*See p. 57 for explanation.)

DISCUSSION OF STRATEGIES AND RESOURCES

The same process is necessary when interests in fair police procedures and efficient law enforcement or neighborhood solidarity and equal opportunity come into conflict. The list of legal interests that may clash is by no means exhaustive. The teacher may want to select cases from another area.

Viewing the dispute resolving function of law as a process of choosing between or accommodating competing valid interests, as opposed to identifying right and wrong parties to a conflict, may be inconsistent with student perception of what courts do. Initial student reaction on confronting valid conflicting interests may be somewhat cynical. Students may wonder what difference it makes how legal disputes are resolved if aims and interests of law are not absolutes and do conflict. Use of actual cases (particularly in role plays where students participate in resolving a legal conflict of valid interests) can be an effective device to show that although few legal interests are absolutes, the legal process is not necessarily arbitrary. By participating in the resolution of particular cases of conflicting valid interests, students may come to appreciate the importance of scrutinizing the facts of each case and of weighing and balancing the competing interests in the particular circumstances so as to reach a result which is as rational and sound an accommodation of competing interests as it is within the limited powers of law to reach.

DETAILED DESCRIPTION OF STRATETIES

DISCUSSION OF STRATEGIES AND RESOURCES

- "Right of Privacy"
- "Search and Privacy"

(Note: Some of these relate to cases suggested in strategy A and therefore similar activities can precede or follow the film viewing. See resource section for details concerning the films.)

(d) Using the *Readers Guide* and *New York Times Index* to obtain periodical accounts, interested students can research as an area of valid interest the conflict between guarantee of a free press v. maintenance of national security. Accounts of the trial of David Ellsberg (April 1973) accused of "leaking" the *Pentagon Papers* may contribute to the study.

RESOURCES*

Materials Related to Free Expression and Dissent v. Public Order and Welfare

Tinker v. DesMoines School District, Vol. 393 U.S. Reports, p. 503 (1969).

High school students protest Vietnam War by wearing black armbands. In weighing free expression rights of students against interests in orderly educational processes, the Supreme Court decides the interest in classroom order must give way in these particular circumstances. See resource section for Understanding III of Module III.

See also "Did the Armbands Disrupt the School" and "Free Expression - A 'Risk' We Must Take," *Liberty Under Law*, Columbus: American Education Publications, AEP Unit Books, 1972, pp. 11-16. One page is devoted to "setting the scene" for the Tinker case; the following pages are concerned with the court decision and the origins of free speech.

Feiner v. New York, Vol. 340 U.S. Reports, p. 315 (1951).

Challenge to a conviction of disorderly conduct for making a peaceful but inflammatory speech. Weighing the "clear and present danger of riot or public disorder" against the interest in protecting free speech on controversial issues, the Supreme Court decides free speech must give way in these particular circumstances. See resource section for Understanding III of Module III.

Gregory v. Chicago, Vol. 394 U.S. Reports, p. 111 (1969).

"MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

"This is a simple case. Petitioners, accompanied by Chicago police and an assistant city attorney, marched in a peaceful and orderly procession from city hall to the mayor's residence to press their claims for desegregation of the public schools. Having promised to cease singing at 8:30 p.m., the marchers did so. Although petitioners and the other demonstrators continued to march in a completely lawful fashion, the onlookers became unruly as the number of bystanders increased. Chicago police, to prevent what they regarded as an impending civil disorder, demanded that the demonstrators, upon pain of arrest, disperse. When this command was not obeyed, petitioners were arrested for disorderly conduct.

*Direct quotations from statutes are indicated by the use of quotation marks. Other statements are summaries or paraphrases of the statute listed.

"Petitioners' march, if peaceful and disorderly, falls well within the sphere of conduct protected by the First Amendment. ... There is no evidence in this record that petitioners' conduct was disorderly. Therefore,...convictions so totally devoid of evidentiary support violate due process.

"The opinion of the Supreme Court of Illinois suggests that petitioners were convicted not for the manner in which they conducted their march but rather for their refusal to disperse when requested to do so by Chicago police. ... However reasonable the police request may have been and however laudable the police motives, petitioners were charged and convicted for holding a demonstration, not for a refusal to obey a police officer. As we said...'[I]t is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction.' ...

"Finally, since the trial judge's charge permitted the jury to convict for acts clearly entitled to First Amendment protection, *Stromberg v. California*, 233 U.S. 359 (1931), independently requires reversal of these convictions.

"The judgments are *reversed*. ...

"MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

"This I think is a highly important case which requires more detailed consideration than the Court's opinion gives it. ...

"...These facts disclosed by the record point unerringly to one conclusion, namely, that when groups with diametrically opposed, deep-seated views are permitted to air their emotional grievances, side by side, on city streets, tranquility and order cannot be maintained even by the joint efforts of the finest and best officers and of those who desire to be the most law-abiding protestors of their grievances.

"It is because of this truth, and a desire both to prmote order and to safeguard First Amendment freedoms, that this Court has repeatedly warned States and governmental units that they cannot regulate conduct connected with these freedoms through use of sweeping, dragnet statutes that may, because of vagueness, jeopardize these freedoms. In those cases, however, we have been careful to point out that the Constitution does not bar enactment of laws regulating conduct, even though connected with speech, press, assembly, and petition, if such laws specifically

bar only the conduct deemed obnoxious and are carefully and narrowly aimed at that forbidden conduct. The delemma revealed by this record is a crying example of a need for some such narrowly drawn law. ...

"The disorderly conduct ordinance under which these petitioners were charged and convicted is not, however, a narrowly drawn law, particularly designed to regulate certain kinds of conduct such as marching or picketing or demonstrating along the streets or highways. Nor does it regulate the times or places or manner of carrying on such activities. To the contrary, it might better be described as a meat-ax ordinance, gathering in one comprehensive definition of an offense a number of words which have a multiplicity of meanings, some of which would cover activity specifically protected by the First Amendment. ..."

Cohen, William et al. *The Bill of Rights: a source book.* New York. Benziger Brothers. 1961.

Part Four, "Freedom of Expression," pp. 193-245, contains useful information on seditions of speech, obscenity, speaking in public places, and prior restraint.

James, L.F. *The Supreme Court in American life.* Fairlawn, N.J. Scott, Foresman and Company. 1964.

See Problem 10, "Freedom of Speech," pp. 98-108. Contains information on Schench v. U.S., Gitlow v. N.Y., Terminiello v. Chicago, and Dennis v. U.S.

Film

"The Bill of Rights in Action Film Series: Freedom of Speech." (See resource section for Understanding IV of Module IV for detailed information.)

Materials Related to Fair Police Procedures v. Effective Law Enforcement

Terry v. Ohio, Vol. 392 U.S. Reports, p. 1 (1968).

"A Cleveland detective (McFadden), on a downtown beat which he had been patrolling for many years, observed two strangers (petitioner and another man Chilton) on a street corner. He saw them proceed alternately back and forth along an identical route, pausing to stare in the same store window, which they did for a total of about 24 times. Each completion of the route was followed by a conference between the two on a corner, at one of which they were joined by a third man (Katz) who left swiftly. Suspecting the two men of 'casing a job, a stick-up' the officer followed them and saw them rejoin the third man a couple of blocks away in front of

a store. The officer approached the three, identified himself as a policeman, and asked their names. The men 'mumbled something,' whereupon McFadden spun petitioner around, patted down his outside clothing, and found in his overcoat pocket, but was unable to remove, a pistol. The officer ordered the three into the store. He removed petitioner's overcoat, took out a revolver, and ordered the three to face the wall with their hands raised. He patted down the outer clothing of Chilton and Katz and seized a revolver from Chilton's outside overcoat pocket. He did not put his hands under the outer garments of Katz (since he discovered nothing in his pat-down which might have been a weapon), or under petitioner's or Chilton's outer garments until he felt the guns. The three were taken to the police station. Petitioner and Chilton were charged with carrying concealed weapons. The defense moved to suppress the weapons. Though the trial court rejected the prosecution theory that the guns had been seized during a search incident to a lawful arrest, the court denied the motion to suppress and admitted the the weapons into evidence on the ground that the officer had cause to believe that petitioner and Chilton were acting suspiciously, that their interrogation was warranted, and that the officer for his own protection had the right to pat down their outer clothing having reasonable cause to believe that they might be armed. The court distinguished between an investigatory 'stop' and an arrest, and between a 'frisk' of the outer clothing for weapons and a full blown search for evidence of crime. Petitioner and Chilton were found guilty, an intermediate appellate court affirmed, and the State Supreme Court dismissed the appeal on the ground that 'no substantial constitutional question' was involved. ...

"Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden 'seized' Terry and whether and when he conducted a 'search.' There is some suggestion in the use of such terms as 'stop' and 'frisk' that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a 'search' or 'seizure' within the meaning of the Constitution. We emphatically reject this notion. ... It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk way, he has 'seized' that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.' Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.' It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly. ...

"The distinctions of classical 'stop-and-frisk' theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. ...

"In this case there can be no question, then, that Officer McFadden 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing. We must decide whether at that point it was reasonable for Officer McFadden to have interferred with petitioner's personal security as he did. ...

"...The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of a particular circumstance. ...

"Petitioner...does not say that an officer is always unjustified in searching a suspect to discover weapons. Rather, he says it is unreasonable for the policeman to take that step until such time as the situation evolves to a point where there is probable cause to make an arrest. When that point has been reached, petitioner would concede the officer's right to conduct a search of the suspect for weapons, fruits or instrumentalities of the crime, or 'mere' evidence, incident to the arrest.

"There are two weaknesses in this line of reasoning, however. First, it fails to take account of traditional limitations upon the scope of searches, and thus recognizes no distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons. ...

"A second, and related, objection to petitioner's argument is that it assumes that the law of arrest has already worked out the balance between the particular interests involved here—the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual. But this is not so. ...

"Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. ... And in

determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. ...

"We must now examine the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner were reasonable, both at their inception and as conducted. ... We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so. ...

"...Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade Katz' person beyond the outer surfaces of his clothes, since he discovered nothing in his pat-down which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.

"We conclude that the revolver seized from Terry was properly admitted in evidence against him. At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. The policeman carefully restricted his search to what was appropriate to the discovery of the particular items which he sought. Each case of this sort, will, of course, have to be decided on its own facts. We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area of conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken. ... *Affirmed.*"

Module 5

Berger v. New York, Vol. 399 U.S. Reports, p. 41 (1967).

Challenge to a conviction of conspiracy to bribe a city official on the ground that key evidence was improperly detected with an electronic wire tap device. Weighing an interest in "privacy of the home" against a most important technique of law enforcement," the Supreme Court decides effective law enforcement must give way in these particular circumstances.

An edited version of the decision is contained in:

Konvitz, M.R. *Bill of Rights reader: leading constitutional cases*, 4th ed. Ithaca. Cornell University Press. 1968. p. 784.

Miranda v. Arizona, Vol. 384 U.S. Reports, p. 436 (1966).

Challenge to a murder conviction because, after the suspect was taken into police custody and before questioning, he was not warned of his rights to silence and to an attorney. Weighing an interest in people being aware of their rights in criminal prosecutions against an interest in gathering confession evidence to convict criminals, the Supreme Court decides that the interest in gathering a confession must give way in this particular circumstances.

An edited version of this decision is contained in:

Konvitz, M.R. *Bill of Rights reader: leading constitutional cases*, 4th ed. Ithaca. Cornell University Press. 1968. p. 819.

Tresolini, Rocco. *These liberties: case studies in civil rights.* New York. Lippincott Company. 1968. pp. 46-60.

Films:

"Interrogation and Counsel," Churchill Films. (22 min. Police efficiency vs. certain rights of the accused).

"Right of Privacy," NET. (59 min. Government and business threats to individual privacy).

"Search and Privacy," Churchill Films. (22 min. Safeguards against police invasion of privacy).

Module 5

Materials Related to Private Property and Neighborhood Security v. Equal Opportunity

Lee v. Nyquist, Vol. 318 Federal Supplement, p. 710 (1970). (Case is now in appeal process.)

"Class action by parents of children attending public schools to enjoin enforcement of New York statute governing assignment of students to achieve racial equality in attendance as violative of equal protection. The three-judge district Court, Hays, Circuit Judge, held that New York statute prohibiting state education officials and appointed school boards from assigning students, or establishing, reorganizing or maintaining school districts, school zones or attendance units for purpose of achieving racial equality in attendance is unconstitutional as violative of equal protection by invidiously discriminating against efforts to achieve racial balance.

"HAYS, Circuit Judge:

"The question in this case is whether Section 3201 (2) of the New York Education Law (McKinney 1970), enacted as Chapter 342, [1969] Laws of New York 1306, denies 'to any person * * * the equal protection of the laws' in violation of the Fourteenth Amendment of the Constitution of the United States. ...

"Section 3201 (2) prohibits state education officials and appointed school boards from assigning students, or establishing, reorganizing or maintaining school districts, school zones or attendance units for the purpose of achieving racial equality in attendance. By the terms of the statute, elected boards continue to have power to engage in such activities.

"Plaintiffs, parents of children attending the Buffalo public schools, governed by an appointed school board, brought this suit on behalf of themselves, their children and all others similarly situated to enjoin the enforcement of Section 3201 (2) and to declare the statute unconstitutional on the ground that it denies equal protection of the laws. Plaintiffs' complaint is that Section 3201 (2) invidiously discriminates against efforts to eliminate racial imbalance in the public schools.

"Plaintiffs' complaint is that Section 3201 (2) impedes efforts to institute programs aimed at reducing racial imbalance in the schools. Defendants contend that plaintiffs lack standing to make this complaint since there is no showing that Section 3201 (2) has affected Buffalo's plans in this regard. It is clear, however, as Superintendent Manch's deposition indicates, that Section 3201 (2) severely inhibits the creation and siting of new middle schools and the adjustment of zone lines so as to ahieve racial balance, as well as the use of other devices aimed at reducing racial segregation in the Buffalo public schools.

"The Buffalo schools, governed by an appointed board, are directly affected by the operation of Section 3201 (2), and plaintiffs have standing to complain of its constitutionality. ...

"[5] Turning to the merits of plaintiffs' claim, we hold that Section 3201 (2), by invidiously discriminating against efforts to achieve racial balance, violates the equal protection clause of the Fourteenth Amendment. ...

"...Before the enactment of Section 3201 (2), the Regents of the University of the State of New York were firmly committed to a policy of eradicating *de facto* segregation in New York's public schools, and appointed education officials were actively engaged in directing plans to improve racial balance. The Regents' efforts met with considerable local resistance. ...

"...It is quite apparent from the legislative history of Section 3201 (2) that it was designed to turn the tables in favor of those recalcitrant local groups. ...

"In the final analysis the statute fails in justification because it structures the internal governmental process in a manner not founded on neutral principles. ... The New York Legislature has acted to make it more difficult for racial minorities to achieve goals that are in their interest. The statute thus operates to disadvantage a minority, a racial minority, in the political process. There can be no sufficient justification supporting the necessity of such a course of action. ...

"We hold that Section 3201 (2) constitutes an explicit and invidious racial classification and denies equal protection of the law.

"The statute is accordingly unconstitutional and its operation is permanently enjoined. A suitable order providing for injunctive relief in accordance with this opinion may be submitted on notice to defendants."

James v. Valtierra, Vol. 401 U.S. Reports, p. 137 (1971).

"Appellees, who are eligible for low-cost public housing, challenged the requirement of Art. XXXIV of the California Constitution that no low-rent housing project be developed or constructed, or acquired by any state public body without the approval of a majority of those voting at a community election, as violative of the Supremacy, Privileges and Immunities, and Equal Protection Clauses of the United States Constitution. A three-judge District Court enjoined the enforcement of the referendum provision on the ground that it denied appellees equal protection of the laws... .

"...California voters adopted Article XXXIV of the state constitution to bring public housing decisions under the State's referendum policy. The Article provided that no low-rent housing project should be developed, constructed, or acquired in any manner by a state public body until the project was approved by a majority of those voting at a community election.

"The present suits were brought by citizens of San Jose, California, and San Mateo County, localities where housing authorities could not apply for federal funds because low-cost housing proposals had been defeated in referendums. The plaintiffs, who are eligible for low-cost public housing, sought a declaration that Article XXXIV was unconstitutional because its referendum requirement violated: (1) the Supremacy Clause of the United States Constitution; (2) the Privileges and Immunities Clause; and (3) the Equal Protection Clause. A three-judge court held that Article XXXIV denied the plaintiffs equal protection of the laws and it enjoined its enforcement. ...

"The three-judge court found the Supremacy Clause argument unpersuasive, and we agree. ...

"...it cannot be said that California's Article XXXIV rests on 'distinctions based on race.' ...The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. ...

"California's entire history demonstrates the repeated use of referendums to give citizens a voice of public policy. ...Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice. Nonetheless, appellees contend that Article XXXIV denies them equal protection because it demands a mandatory referendum while many other referendums only take place upon citizen initiative. ...

"Furthermore, an examination of California law reveals that persons advocating low-income housing have not been singled out for mandatory referendums while no other group must face that obstacle. Mandatory referendums are required for approval of state constitutional amendments, for the issuance of general obligation long-term bonds by local governments, and for certain municipal territorial annexations. ...

"The people of California have also decided by their own vote to require referendum approval of low-rent public housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions

that will affect the future development of their own community. This procedure for democratic decisionmaking does not violate the constitutional command that no State shall deny to any person 'the equal protection of the laws.'

"The judgment of the three-judge court is reversed and the cases are remanded for dismissal of the complaint.

"*Reversed and remanded.*

"In my view, Art. XXXIV on its face constitutes invidious discrimination which the Equal Protection Clause of the Fourteenth Amendment plainly prohibits. 'The States, of course, are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" *as such* in the formulation and application of their laws.' ...

"The Court, however, chooses to subject the article to no scrutiny whatsoever and treats the provision as if it contained a totally benign, technical economic classification. Both the appellees and the Solicitor General of the United States as *amicus curiae* have strenuously argued, and the court below found, that Art. XXXIV, by imposing a substantial burden solely on the poor, violates the Fourteenth Amendment. Yet after observing that the article does not discriminate on the basis of race, the Court's only response to the real question in these cases is the unresponsive assertion that 'referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice.' It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect.

"I respectfully dissent."

Shelley v. Kraemer, Vol. 334 U.S. Reports, p. 1 (1948).

Challenge to enforcement of a clause in a deed to a house where homeowner has promised neighbors only to sell to whites. Weighing an interest allowing discrimination in one's private affairs against an interest in equality in the enjoyment of property rights, the Supreme Court determines the interest in property rights must give way in these particular circumstances.

This decision in edited form may be found in:

Konvitz, M.R. *Bill of Rights reader: leading constitutional cases*, 4th ed. Ithaca. Cornell University Press. 1968. p. 1003.

UNDERSTANDING IV

LAW IS LIMITED IN ITS CAPACITY TO DEAL WITH A SOCIAL PROBLEM WHEN EITHER THE CAUSES OR REMEDIES OF THE PROBLEM ARE UNKNOWN OR HIGHLY UNCERTAIN.

A. *Explanation of Understanding IV*

This understanding about a limit of law concerns the fact that many social problems are very complex. The causes of some social problems as well as the cures are unknown. Yet we often try to combat these problems with the law. When law is put to work on a complex social problem, its effective capacity may be limited by the unknown nature of the cause or cure of the problem. For example, criminal activity is a growing problem in our society, but the exact causes of crime are unclear. Even if causes of crime can be identified, the course of action that would effectively respond to these causes is uncertain. These uncertainties limit the capacity of law.

B. *Teaching Understanding IV*

OBJECTIVES

- Drawing upon media accounts, the student can list a number of contemporary examples of law being ineffectual, and can identify the indications of imprecise knowledge of cause or cure for the problem which make the law ineffectual.

QUESTIONS TO REACH UNDERSTANDING

- How is the capacity of law limited when the cause or the cure of a problem is not known?
- Should law be used in a situation where the cause or cure of a problem is uncertain?

Module 5

DETAILED DESCRIPTION OF STRATEGIES

(a) Have each person in the class write brief answers to these questions:

- What do you feel is the most crucial problem that the people of United States face today?
- What do you think is the cause of this problem?
- What do you think are the solutions to the problem you have identified?

When all students have completed this task, have each student discuss his selection of a problem with one other student or a small group of students, attempting to reach concensus concerning the most serious social problem facing American society today.

(b) After the class has identified the social problem which is to be the subject of this activity, have students suggest all types of legal solutions to the problem without rejecting any. A list may be compiled on the chalkboard.

The resource section accompanying this understanding contains materials related to two possible problems:

- Poverty and the effectiveness of welfare in dealing with the problem.
- Crime and the effectiveness of our punishment system in deterring criminal activity.

DISCUSSION OF STRATEGIES AND RESOURCES

Sometimes law falls dramatically short of solving pressing social problems. In a land of plenty we have many poor. Crime rates continue to rise. Procedures and resources in this understanding suggest considering an illustrative complex social problem. As students focus on the question of what causes a problem such as poverty or crime, they may find it difficult to identify a clear answer. This should lead to an understanding about a limit of the capacity of law: where the cause of a problem is unclear, the extent to which law can be used to design an effective cure is limited.

For purposes of the activities directed toward this understanding, any complex social issue which emerges in the previous strategy will serve as the necessary vehicle. It is important that the problem be a complex one in which the exact cause-effect relationship that creates the problem cannot be determined. The problem can be within the immediate experience of students or it can be a current problem in the United States.

DETAILED DESCRIPTION OF STRATEGIES

DISCUSSION OF STRATEGIES AND RESOURCES

(c) In gathering information on the selected problem, individuals or teams of students should examine factual materials on the problem. If solutions are advanced in the materials, have students review and discuss them. The following questions might serve to focus student attention:

- What are possible causes of the problem?
- What are possible solutions?
- Which suggested solutions will not work? Why?
- Why is it difficult for society to come to grips with this problem?

(d) Arrange for an official charged with administering the law dealing with a selected problem to speak to the class. Have him explain the difficulties associated with his job.

(f) Have students consider all of the legal solutions that have been suggested by themselves or in the materials which they have examined. If teams of students have explored separate sets of materials, a fishbowl format will be useful in considering possible solutions. Possible questions for discussion include:

- Which legal solutions will not work?
- Which will (might) work?
- What accounts for the limits of these solutions that the group thinks might work?

DETAILED DESCRIPTION OF STRATEGIES

DISCUSSION OF STRATEGIES AND RESOURCES

- Why is law limited in dealing with the problem?
- What can be determined about the limitations of law in dealing with social problems?

(f) A debate may be used to emphasize the difficulty in determining the precise cause and exact remedy for a complex social problem. Some debate topics related to the resources given in this module include:

- Resolved, that the granting of welfare reduces initiative and prolongs the poverty cycle.
- Resolved, that the threat of punishment serves to deter potential criminals.

RESOURCES*

Materials Related to Poverty and the Welfare Problem

"There must be a better way." *Newsweek magazine.* Vol. 77. February 8, 1971.

"Welfare: trying to end the nightmare." *Time magazine.* Vol. 97. February 8, 1971.

"Welfare out of control." *U.S. news and world report.* Vol. 70. February 8, 1971.

Harrington, Michael. *The other America: poverty in the United States.* Baltimore. Penquin Books, Inc. 1963.

Influential nontechnical study of poverty in the United States.

The incidence and effects of poverty in the United States. Sociological Resources in Social Studies. Boston. Allyn and Bacon. 1969.

One of the *Episodes in Social Inquiry* series growing out of the Sociology Project, this is an excellent collection of case studies presented in an inquiry approach.

Poverty and welfare. Columbus. American Education Publications. AEP Unit Books. 1972.

Includes statements by welfare recipients, taxpayers, and social workers.

Bennett, Robert & Newman, Thomas. *Poverty and welfare.* Boston. Houghton Mifflin Company. Justice in Urban America Series. 1969.

Superior, easy-to-read booklet (86 pp.) which explores the causes of poverty, attitudes and issues related to poverty, government aid and welfare, and a series of court cases.

Filmstrip

"The Welfare Dilemma." Pleasantville, N.Y. Guidance Associates.

*Direct quotations from statutes are indicated by the use of quotation marks. Other statements are summaries or paraphrases of the statute listed.

Module 5

Materials Related to Crime and the Deterrence of Crime

Bassiouni, M.C. *Crimes and justice.* Boston. Houghton Mifflin Company. Justice in Urban America Series. 1969.

Sections of this easy-to-read booklet (84 pp.) consider the necessity of rules to a society, crimes and punishments, criminal procedures, and the crime problem.

Clark, Ramsey. *Crime in America: observations on its nature, causes, prevention, and control.* New York. Simon and Schuster. 1970. (Also available as a paperback from Pocket Books.)

An excerpt from *Crime in America* is contained in "Law In American Society: Journal of the National Center for Law-Focused Education," Vol. 1.

Fraenkel, J.R. *Crime and criminals: what should we do about them?* Englewood Cliffs, N.J. Prentice-Hall, Inc. Inquiry into Crucial American Problems. 1970.

A superior text from a superior series. Explores the nature, causes, and possible solutions to crime. Helpful bibliography.

"Justice on trial." *Newsweek magazine.* Vol. 77. March 8, 1971.

Leinwand, Gerald, gen. ed. "Problems of American Society Series." New York. Pocket Books.

Relevant titles include: *Crime and juvenile delinquency,* 1968; *The police,* 1972; and *Prisons,* 1972. Each book contains a second part with selected readings drawn from a variety of sources.

The penal system. Columbus. American Education Publications. AEP Unit Books. 1972.

Case studies open up the purpose and effectiveness of the penal system for discussion.

The Police. Columbus. American Education Publications. AEP Unit Books. 1972.

Case studies and a dramatic narrative probe dimensions of law enforcement.

The President's Commission on Law Enforcement and Administration of Justice. *The challenge of crime in a free society.* Washington. U.S. Government Printing Office. 1968.

A comprehensive report on crime and its deterrence. Contains chapters on youth crime, organized crime, drug abuse, drunkeness, and measures for combatting crime.

UNDERSTANDING V

LAW IS LIMITED IN ITS CAPACITY TO DEAL WITH A SOCIAL PROBLEM WHEN NECESSARY RESOURCES AND TECHNOLOGY ARE NOT AVAILABLE.

A. *Explanation of Understanding V*

The fifth understanding concerns a limit imposed on the capacity of law by lack of resources or technological capability. The cause of a social problem may be clear. Legal means that might resolve this problem might be familiar. But the possibility of dealing with this problem is limited by the physical resources and technological capacity of the society. This understanding really deals with the problem of scarcity. Human wants are unlimited, but even in our advanced society, resources, including knowledge, are limited. This imposes a limit on the capacity of law.

B. *Teaching Understanding V*

OBJECTIVES

- Given a series of negative statements as air pollution, traffic congestion, and deteriorating public buildings, the student can identify those in which the effectiveness of law in remedying the problem is limited in terms of resource allocation, and can suggest several public steps which would make legal action more effective.

QUESTIONS TO REACH UNDERSTANDING

- What is the relationship between law and limited resources and technology?
- How does this relationship affect the capacity of law?

Module 5

DETAILED DESCRIPTION OF STRATEGIES

(a) Review the principle of economic scarcity (unlimited wants/limited resources) with students. Have students formulate answers to these questions:

- How is law used in the allocation of resources in our society?
- How is law ultimately limited by the limitation of economic resources?

Some of the strategies suggested in *Teaching About American Economic Life* (e.g., the exercise on Comparative Advantage on page 43, and the Oil Transport Game, pages 48-53) would be useful in reviewing the application of these economic concept.

(b) The resource section contains statements which assist in defining two problems in which improved technology would make it possible to accomplish a goal now beyond reach: the energy crisis and automobile pollution. Others may be selected by the class. With regard to the problem or problems selected have students attempt to determine how law could be used to devote more of our scarce resources to developing the technology necessary to solve the problem.

Reference to the five legal techniques in Module II would also be helpful.

DISCUSSION OF STRATEGIES AND RESOURCES

The procedures and resources suggested for this understanding are intended to show how the capacity of law may be limited by scarcity of resources, including the resource of technological capability. By asking students to determine how to allocate limited resources, students should realize that economic resources are limited and that priorities must be established in the use of resources.

Students should be asked how law is used to order the priorities of resource use. One important way we use law for such allocation is through collecting taxes from private citizens and corporations and converting this money into public benefits (education, welfare, highways, hospitals, defense). Students will note that such public funds are limited by the resources of the society, and, therefore, limited funds have to be allocated among many public needs. For example, law could more effectively combat the problem of pollution if more public funds were channelled to this problem. However, this might happen only to the exclusion of resources for education or defense. In dealing with a current problem, students may emphasize the limitations of technological capacity. Laws can combat pollution by regulating and setting standards for activities which threaten the environment. But the law is necessarily held back in these efforts until technology advances to a point where it is feasible to produce a "clean" automobile engine or it is possible to harness atomic energy without contamination.

Eventually students will probably return to the basic problem that scarce resources limit the use of law to alleviate any problem. In moving toward

this understanding, students may encounter other limits of the capacity of law developed in other understandings. Frequently, the capacity of law is limited by more than one factor. This is especially true in dealing with resource limitation and allocation. For example, the values of the society (Understanding II) or the knowledge of cause and effect relationships available in the society (Understanding V) may combine with resource limitations to limit law.

Module 5

RESOURCES*

Ehrlich, Paul & Holdren, John. "The Energy Crisis." Copyright 1971 by Saturday Review Co. First appeared in SATURDAY REVIEW August 7, 1971. Used with permission.

The following paragraph might be used to define the problem:

"Because no means of supplying energy is without serious liabilities, there are no easy technological solutions to our energy problems. The use of fossil fuels pollutes air and water, defaces the landscape through mining, and depletes a resource having other recyclable uses—for example, lubrication and synthetics. Unexploited hydroelectric sites are in limited supply, and their development compromises other values. Nuclear fission poses hazards at every step of the enterprise, from mining through fuel reprocessing, and it creates a burden of radioactive wastes that must be infallibly contained, unerringly transported, and indefinitely interred. Controlled fusion has not yet been conclusively demonstrated to be scientifically feasible, and it will not be completely free of environmental costs when we do get it. Solar energy is unevenly distributed, dilute, and presently expensive to harness. There are other energy sources (and other defects in the ones just listed), but a more comprehensive compilation simply confirms the verdict: The 'energy crisis' will not be solved by technology alone."

A simulation such as *Rutile and the Beach*, in Unit 5, *Habitat and Resources*, of the High School Geography Project, would be very useful in developing this understanding, and has a high degree of student interest and involvement. Now published by the Macmillan Company.

Automobile Pollution: The following paragraph might be used to define the problem:

The nitrogen oxide emission in automobile pollution can be reduced by lowering the temperature of combustion. This temperature can be lowered by recirculation systems that carry exhaust back into the combusion chamber through an orifice in the line leading from the exhaust to the intake manifold. However, lead from gasoline tends to clog the recirculation mechanism. Leaded gas has also caused difficulty with catalytic and thermal exhaust reactors which can be installed on exhaust systems to reduce hydrocarbon and carbon monoxide pollution. Lead is used in gas to raise it to the octane level currently required by automobile engines. It would cost billions for the refineries to retool for mass production of unleaded gas. It appears that there will be a loss of fuel economy in lower octane unleaded gas consumption. If all automobiles currently on the road lost 5% in fuel economy, 4.5 billion gallons of extra fuel would have to be produced. In addition, the costs of installing such control devices on cars might well exceed $100 per car. (Adapted from *Law, its nature functions and limits* by R.S. Summers and C.G. Howard. 1972.)

*Direct quotations from statutes are indicated by the use of quotation marks. Other statements are summaries or paraphrases of the statute listed.

UNDERSTANDING VI

LAW IS LIMITED IN ITS CAPACITY TO DEAL WITH A SOCIAL PROBLEM WHEN THE PARTICULAR FACTS TO WHICH LAW APPLIES CANNOT BE RELIABLY DETERMINED THROUGH LEGAL PROCESSES.

A. *Explanation of Understanding VI*

This understanding treats a limit imposed on the capacity of law by the elusiveness of facts. Although law attempts to solve problems through the process of the rational application of rules, it often is difficult to determine that a particular situation to which a given legal rule is applicable exists. The rule that a person who is negligent should compensate for the resulting harm is clear, but proving that a person has been negligent is often very difficult. The rules that establish criteria for receipt of welfare are easily identifiable, but determining whether the given criteria have been met in a particular case may not be easy. The difficulty of determining facts limits the capacity of law.

Why should there by any difficulty in ascertaining legal "facts"?

> Aren't facts facts? No, and the sources of good faith disputes over facts are numerous. It is enough to identify several common ones. The parties may reasonably differ over the credibility of a key witness or over the qualifications of a key expert who has been called into the negotiations. Where the disputants are privy to the facts originally, their own versions may still differ, because they actually perceived the relevant events differently in the first place, or because their abilities to draw rational inferences from raw events vary, or because emotional involvement has, in different ways, colored their present recollections of what occurred. Facts aren't facts. Someone has to decide facts, and deciders may differ. Sometimes, even reasonably.
> (From, "Law, Adjudicative Processes and Civil Justice" by R.S. Summers in *Law, Reason and Justice*, edited by G. Hughes. 1969.)

Professor Summers considers only good faith sources of disputes over facts. To his list could be added obvious sources connected with self-serving dishonesty.

To reach Understanding VI the following materials focus on limits of law in determining facts in the context of judicial settlement of legal disputes where the application of rules of law is by an impartial third party (a court). However, before rules of law can be applied, circumstances to which the law is to be applied must be determined. Often, the disputed questions at trial concern the facts of the case rather than

the law of the case. In a criminal case, the D.A. claims X killed Y in cold blood, but X says it was purely a matter of self-defense. While both parties agree on the relevant rule of law—that cold blooded killing killing is murder—they disagree on the facts. In a civil case on auto negligence, both plaintiff and defendant agree that driving on the left side of the road is negligent, but there is likely to be a dispute as to who was driving on which side of the road at a particular moment.

It is generally the job of the judge (with the help of the lawyers) to figure out the law of the case. On the other hand, there is a right to have a jury settle disputed facts. The law uses several techniques to try to make this fact finding process as accurate as possible. Lawyers for each side usually present the case. There are complex rules of evidence regulating the information that can be presented to the jury, and determining who wins if the jury is equally pursuaded by information (or lack of information) supporting each side.

Nevertheless, the rules of evidence provide no guarantee that legal fact finding will be truth finding, for as a leading law text on the subject points out:

> Evidence is produced at trial so that an impartial trier can decide how an event occurred. Time is irreversible, events unique, and any reconstruction of the past at best an approximation. As a result of this lack of certainty about what happened, it is inescapable that the trier's conclusions be based on probabilities... . Fundamental, then, is acceptance of the fact that the results of adjudication are imperfect, that the rules present a pragmatic attempt to come as reasonably close to the truth as the law's resources permit. (From *Cases and Materials on Evidence* by Maguire, et al. 6th ed. 1973. Reprinted by permission of The Foundation Press, Inc.)

The law must often resolve a fact dispute in the face of persistent conflicting stories, neither of which can be proven in any absolute sense.

B. *Teaching Understanding VI*

OBJECTIVES

- Given details concerning a real or hypothetical conflict in which details of the event are in dispute, the student can identify the various parameters of the dispute and suggest an equitable settlement, giving his reasons for this decision.
- In reviewing the transcript of a court trial, the student can list the various points of fact which are in dispute, and can suggest reasons for the discrepancies.

Module 5

QUESTIONS TO REACH UNDERSTANDING

- How is the capacity of law to determine facts limited?
- How does this limitation affect the capacity of law to reach its goals?
- Why do legal decisions have to be made despite the limitations of the fact-finding process?

Module 5

DETAILED DESCRIPTION OF STRATEGIES

1. Accurately determining factual details of past events is often difficult.

   (1a) Ask another teacher or a student to come into the class and remain in evidence for a few minutes. After he/she withdraws, instruct each student to write a detailed description of the teacher including relative height and weight, eye color, color and style of hair and clothing. In class discussion, evaluate the written descriptions to see if, in this simple exercise, defects in memory and perception obscure accurate recollection of the past. (You may wish to have the subject return, to check the accuracy of the observations.)

   (1b) Have each student in the class write a short but detailed account of some unexpected incident that occurred in the class or at the school sometime more than a month ago but within the last year or two (a fire, an accident, a fight). Analyze these accounts to see if memory or other factors obscure the true happenings of the past and interfere with efforts to recreate what actually did happen.

   (1c) Stage a surprise skit for the class in which someone breaks into the classroom, has a quick and loud exchange of words with the teacher, threatens an assault on the teacher with some weapon, and quickly retreats. Before any discussion,

DISCUSSION OF STRATEGIES AND RESOURCES

The suggested activities within this understanding attempt to illustrate two major points. First, by having each student describe something each has commonly perceived and then comparing data collected, students may learn that past facts are not easily ascertained. In examining why this is so, elements of imperfect memory, fallible sense perception, and overt and latent prejudice may be evident.

The second series of suggested activities attempt to demonstrate that the jury's job of resolving disputes of fact often may be something other than a task of sorting out the truth from the lies. Often the jury, without ever knowing the truth, reaches a result by following rational and deliberate procedures that are merely designed to produce a maximum probability of accuracy.

The two main points within this understanding are not easy to explain to students. Consequently, the suggested activities propose active student involvement in discovering both the difficulty of accurately recreating past facts and the limitations of the power of the jury to determine the truth.

have each member of the class record in detail what he or she has witnessed. Analyze these accounts to see if human sense perception obscures true happenings of the past and interferes with efforts to determine what really did happen.

2. Based on conflicting evidence on a disputed question of fact, jury verdicts are an attempt to approximate the truth.

Through one or more of the following exercises, have students consider the extent to which a jury verdict, after conflicting evidence on a disputed question of fact has been presented, is a true determination of what did occur:

(2a) Have students view a film showing presentation of conflicting evidence at trial. Before showing the portion of the film revealing the jury's verdict, divide the class into groups of 12 to deliberate as juries and reach verdicts of their own. Consider whether such findings are absolute determinations of truth or merely rational attempts to reconstruct a past event as fairly and accurately as possible. (See resource sections for film suggestions.)

(2b) Have students visit a trial to view presentation of conflicting evidence on a question of fact. Before hearing what verdict the jury actually reaches, return to class and divide the class into groups of 12 to deliberate as juries

and reach verdicts. Consider whether such findings are absolute determinations of truth or merely rational attempts to reconstruct a past event as fairly and accurately as possible. (Note: In this discussion, involvement of an attorney or a student in a law school would be very helpful.)

(2c) Excerpt portions of a trial transcript of testimony for presentation as a role play or skit by students. Include in such role play a jury which deliberates and reaches a verdict after having heard conflicting testimony. Consider whether this verdict is an absolute determination of truth or merely a rational attempt to reconstruct a past event as fairly and accurately as possible.

(2d) The Constitutional Rights Foundation has prepared and fieldtested a simulation activity concerning jury selection which could be useful in reaching this understanding. The New York State Bar Association Mock Trial program is also pertinent.

RESOURCES*

Reference Materials for the Teacher

Frank, J. "Law and the modern mind," reproduced in Lloyd, Dennis, *Introduction to jurisprudence.* New York. Praeger. 1960. pp. 280-283.

Summers, R.S. "Law, adjudicative processes and civil justice," in *Law, reason, and justice: essays in legal philosophy,* edited by Graham Hughes. New York. New York University Press. 1969. pp. 169-184.

Source Material for Trial Transcript Excerpts

Howard, C.G. & Summers, R.S. *Law: its nature, functions and limits.* Englewood Cliffs, N.J. Prentice-Hall. 1965. pp. 67-80.

Includes testimony from a negligence trial.

Norris, Harold. *A casebook of complete criminal trials.* Detroit. Citation Press. 1965.

Includes complete transcripts from nine different types of trial (rape, murder, larceny, conspiracy, narcotics, etc.) Briefest transcript (10 pages) deals with driving while intoxicated. A unique kind of casebook.

Text Material for Students

Rights of the accused. Columbus. American Education Publications, AEP United Books. 1968.

Case study for negligent homicide, including testimony of a trial.

Summers, R.S., Campbell, A.B., & Hubbard, G.F. *American legal system.* Unit V - "The limits of law." Lexington, Mass. Ginn & Co. 1973.

Simulations

A simulation, based on *Rights of the Accused,* has been prepared and is distributed through Clark Abt, Inc.

*Direct quotations from statutes are indicated by the use of quotation marks. Other statements are summaries or paraphrases of the statute listed.

Module 5

Jury Selection and *Police Patrol* both are simulations prepared by the Constitutional Rights Foundation, 609 South Grand Avenue, Los Angeles, 90017. They both involve attempts to determine facts versus inaccuracies in perception.

Films

"Trial: The City and County of Denver v. Lauren R. Watson." Indiana.

Actual criminal trial of resisting arrest charge. Filmed from start to finish in four 90-minute segments.

"The Bill of Rights in Action: Story of a Trial." Bernard Wilets, Director. Los Angeles. Bailey Film Associates. (22 minutes).

Comprehensive, informational film dealing with events leading up to a trial (arrest, arraignment, trial). Since the offense involved is a misdemeanor, the trial deals with rather trivial matter. Provides insights into "due process."